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A  
TREATISE  
ON  
CRIMINAL LAW  
AS APPLICABLE TO THE  
DOMINION OF CANADA.

BY  
S. R. CLARKE,  
OF OSGOODE HALL, BARRISTER-AT-LAW.

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TORONTO:  
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1872.

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ENTERED according to Act of the Parliament of Canada, in the year of our Lord, one thousand eight hundred and seventy-two, by SAMUEL ROBINSON CLARKE, Barrister-at-Law, in the Office of the Minister of Agriculture.

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TO THE RIGHT HONORABLE  
SIR JOHN ALEXANDER MACDONALD, K.C.B.,  
MINISTER OF JUSTICE

FOR THE  
DOMINION OF CANADA,

ONE OF HER MAJESTY'S MOST HONORABLE PRIVY COUNCIL,  
&c., &c., &c.,

BY WHOSE EXERTIONS,  
AND UNDER WHOSE ADMINISTRATION,

THE CRIMINAL LAW

OF THE  
CONFEDERATED PROVINCES HAS BEEN ASSIMILATED,

THIS WORK

IS, BY PERMISSION, MOST RESPECTFULLY INSCRIBED,

BY

HIS MOST OBEDIENT SERVANT,

SAMUEL ROBINSON CLARKE.

OSBORN HALL, October, 1872.



## P R E F A C E .

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IN the following pages, I have attempted to supply a want long felt by the Members of the Profession in Canada.

Since the establishment of Courts in the country, the common law of England having been adopted, the decisions of the several Courts are very much in harmony in each of the Provinces which now form the Dominion. In addition to this, the Acts passed since the Confederation of the Provinces have, in a great measure, assimilated the Statute Laws, so that there is now one uniform Code of Criminal Jurisprudence prevailing from the Atlantic to the Pacific.

It is obvious that, under these circumstances, the decisions of each Province are of essential importance in expounding the law now prevailing in all; and the contemplated establishment of a Supreme Court for the Dominion renders it very desirable that the administration and interpretation of the laws should not vary in the different Provinces.

I have, therefore, collected all the cases on Criminal Law which have been decided in the several Provinces, thereby making the Work essentially Canadian in its character. All the cases in "The Law Reports" have also been given. From these limited materials, I need scarcely say, I do not pretend to call my work a *complete* Treatise. If it is complete in being an accurate

Digest of all Canadian cases, my aim and ambition will be satisfied. The Chapter on Extradition is altogether confined to Canadian cases; and a very considerable portion of the Work will be found to be made up of original materials, hitherto unappropriated.

In the preparation of the Work, I have searched and examined the following Reports—namely, (Nova Scotia), *James, Thomson, Cochran, and Oldright*; (New Brunswick), *Kerr, Allen, and Hannay*; (Quebec), Lower Canada Reports, Vols. One to Seventeen, inclusive, Lower Canada Jurist, Vols. One to Fifteen, inclusive, *Stuart's* Appeal cases and Vice-Admiralty cases, with the Digests of *Robertson* and *Ramsay*; (Ontario), Queen's Bench Reports, O. S., Six Vols., N. S., Vols. One to Thirty-one, inclusive, Common Pleas, Vols. One to Twenty-one, inclusive, Upper Canada Law Journal, O. S., Ten Vols., N. S., Eight Vols., Practice Reports, Five Vols., Chamber Reports, Two Vols., Error and Appeal Reports, Three Vols., and the Reports of *Draper* and *Taylor*.

I beg to express my thanks to the many kind friends who have encouraged and assisted me in the Work. To the Hon. J. H. GRAY, D.C.L., M.P., I am particularly indebted. Several manuscript cases, inserted in the Work, have been forwarded by the Hon. J. C. ALLEN, of Frederickton, N. B. Thanks are also due to GEO. A. BOOMER, Esq., Barrister-at-Law, and Mr. W. M. HALL, Student-at-Law, for the care and labour bestowed on the Index and Table of cases.

Considering the great importance of every branch of the law relating to criminal jurisprudence, it is a matter of surprise that no Treatise on the subjects discussed in the following sheets has been written by any member of the profession of the law during our existence as a Colony.

During a long period the criminal laws of our country have grown up, as it were, with the necessities of our advancement and progress. Many interesting points have been argued by eloquent and able advocates, and decided by learned and enlightened judges; and the recent legislative effort to assimilate the criminal laws of the Confederated Provinces, has made them such as to induce an expression of my earnest hope that the excellent Code of laws which has been extricated from the discursive mass by which they were encumbered, digested by experience, and methodized by reason, forming a lucid and harmonious whole, may long remain as a monument to our Confederated Provinces, paying a homage to reason and to right; and that our Sister Provinces may profit by the example of our own, for whom the codifiers of our Criminal Law may be truly said not to have laboured in vain.

Criminal Jurisprudence has not hitherto fallen within the scope of Canadian legal authors; and, although the practising lawyer may, perhaps, be more disposed to *refer* to my work than to *peruse* it, I trust that, at least, his frequent references to it, guided as he is by a copious Index readily to what he may require, will induce a favourable reception of my undertaking, which has been to furnish the Profession with a volume on Criminal Law and Practice, at once compendious and useful.

Relying on the kindness of those who may *peruse* this book with a friendly disposition to its author, and the candour of those who may *refer* to it for the sake of information alone, I now offer it to the Public, and to the Profession, of which I am a member, with a sincere desire that it may be useful to both.

S. R. C.

OSGOODE HALL, TORONTO,  
13th May, 1872.



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<b>Allen</b> .....	Allen's Reports, New-Brunswick.
<b>Arch. Cr. Pldg.</b> .....	Archbold's Criminal Pleading.
<b>Berton</b> .....	Berton's Reports, New-Brunswick.
<b>Chr. Reps.</b> .....	Chamber's Reports, Ontario.
<b>C. L. J., N. S.</b> .....	Canada Law Journal, New Series.
<b>Cochran</b> .....	Cochran's Reports, Nova Scotia.
<b>Draper</b> .....	Draper's Reports, Ontario.
<b>E. and A. Reps.</b> .....	Error and Appeal Reports, Ontario.
<b>Grant</b> .....	Grant's Chancery Reports, Ontario.
<b>Hannay</b> .....	Hannay's Reports, New-Brunswick.
<b>James</b> .....	James' Reports, Nova Scotia.
<b>Kerr</b> .....	Kerr's Reports, New-Brunswick.
<b>L. C. G.</b> .....	Local Courts' Gazette, Ontario.
<b>L. C. J.</b> .....	Lower Canada Jurist.
<b>L. C. R.</b> .....	Lower Canada Reports.
<b>Oldright</b> .....	Oldright's Reports, Nova Scotia.
<b>Rev. Critique</b> .....	La Revue Critique de legislation, et de juris- prudence du Canada, Montreal.
<b>Rob. Dig.</b> .....	Robertson's (Andrew) Digest of Reports, Que- bec.
<b>Russ. Cr.</b> .....	Russell on Crimes and Misdemeanors.
<b>S. L. C. A.</b> .....	Stuart's Lower Canada, Appeal cases.
<b>S. V. A. R.</b> .....	Stuart's Vice Admiralty Reports, Quebec.
<b>Taylor</b> .....	Taylor's Reports, Ontario.
<b>The Chesapeake Case</b> ...	A pamphlet containing a full report of this case, New-Brunswick.
<b>The St. Albans Raid</b> ...	A small book containing a full report of this case, Quebec.
<b>Thomson</b> .....	Thomson's Reports, Nova Scotia.
<b>U. C. C. P.</b> .....	Common Pleas' Reports, Ontario.
<b>U. C. L. J.</b> .....	Upper Canada Law Journal.
<b>U. C. P. R.</b> .....	Practice Reports, Ontario.
<b>U. C. Q. B.</b> .....	Queen's Bench Reports, Ontario.
<b>U. C. Q. B., O. S.</b> .....	" " " " Old Series.



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# THE CRIMINAL LAW OF CANADA.

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## INTRODUCTORY CHAPTER.

### THE ENGLISH CRIMINAL LAWS PREVAILING IN THE DOMINION.

COLONIES may be acquired by occupancy, conquest and cession. When a colony is acquired in either of these modes, it becomes material to consider what laws apply and are in force therein.

On the acquisition of a colony by occupancy, all English laws applicable and necessary to its state and condition are immediately in force, such as the general rules of inheritance and of protection from personal wrongs ; but other provisions applicable and peculiar to a people in a more advanced state of civilization and artificial refinement are neither necessary nor convenient in a new and undeveloped country, and therefore are not in force. (a)

In conquered colonies, the laws existing at the time of the conquest, except such as are contrary to the laws of

(a) *Uniacke v. Dickson*, 1 James, 300, per *Hill, J.*, confirmed by *Smyth v. McDonald*, 1 Oldright, 274; *Doe dem Anderson v. Todd*, 2 U. C. Q. B. 84, per *Robinson, C. J.*

God, remain in force until altered by the conquering power. The latter, however, can impose on the subjugated people such laws, imperial or otherwise, as may be thought fit. (a)

In ceded colonies the same general rule prevails as in conquered colonies, except in so far as the power of the crown may be modified by the treaty on cession.

The Provinces of Ontario, Quebec, Nova Scotia, New Brunswick, and Manitoba, are all colonies of the British Empire.

It is not perfectly clear under what modes of acquisition these respective colonies can be classed. The country was originally discovered and to some extent settled by the French, and the latter claimed the whole territory from the Gulf of the St. Lawrence to the then unknown western wilds. By the treaty of Utrecht, signed in 1713, France ceded to England the present Provinces of Nova Scotia and New Brunswick, then called Acadia; and by the treaty of Paris, concluded in 1763, the entire territories claimed by the French, including the present Provinces of Ontario, Quebec and Manitoba, were ceded to the Imperial Crown. As to the Provinces of Ontario, Manitoba and Quebec, there seems little doubt that their acquisition may be ascribed to cession founded on conquest; the two former especially, for when the treaty was ratified no settlements had been made in them.

In the case before referred to, (b) Nova Scotia seems to have been treated as a settled colony; in other words, as acquired by occupancy. If this be the correct view, New Brunswick would fall within the same class, as it and Nova Scotia formerly comprised one Province, and the division was only effected in 1784.

(a) *Doe dem Anderson v. Todd*, *supra*.

(b) *Uniacke v. Dickson*, 1 James, 287.

It would seem that, as to the English laws prevailing in Nova Scotia and New Brunswick, they may be treated as settled colonies. If they were treated as ceded colonies, then the laws existing at the time of the cession would remain in force until altered by the Imperial Parliament. No such alteration, at least so far as the author is aware, has been made, nor has any Imperial statute or proclamation expressly extended the English laws to these colonies. The law of England, both civil and criminal, with certain restrictions and limitations, prevails therein. The early settlers of the country must therefore have carried with them such English laws as were applicable to their condition as an infant colony. The fact that no Imperial Legislation has taken place with reference to these Provinces seems to strengthen this view, for in the case of a settled colony the Crown cannot alter or impose laws or otherwise interfere in the legislation of the country as in the case of conquest or cession. (a)

We now proceed to consider more particularly the English criminal laws prevailing in the several Provinces of the Dominion. By the Royal Proclamation of 1763, the criminal law was introduced into the Province of Quebec, as there defined, and by the Imperial Statute, 14 Geo. 3, c. 83, it was extended to the whole of the present Provinces of Ontario and Quebec. This statute, after reciting the benefits and advantages resulting from the use of the criminal law since its introduction by the proclamation of 1763, enacted that the same should continue to be administered and observed as law, "as well in the description and quality of the offence as in the method of prosecution and trial, and the punishments and forfeitures thereby inflicted." It took effect on the 1st of May,

(a) See, however, *Jouett v. Lockwood*, 2 Kerr, 683, per Chipman, C. J.



1775. In Ontario, however, the 40 Geo. 3, c. 1, was subsequently passed, and introduced the criminal law of England as it stood on the 17th day of September, 1792, "and as the same has since been repealed, altered, varied, modified or affected by any Act of the Imperial Parliament having force of law in Upper Canada, or by any Act of the Parliament of the late Province of Upper Canada, or of the Province of Canada, still having force of law, or by the Consolidated Statutes relating to Upper Canada, exclusively, or to the Province of Canada."

The criminal law, therefore, in the Provinces of Ontario and Quebec, has been introduced by express statutes, but in the former, by the 40 Geo. 3, c. 1, it was brought down to a more recent date than in the latter.

The authority for the introduction of the English criminal laws into Nova Scotia and New Brunswick has been already shewn.

With regard to the Province of Manitoba, Imperial legislation has from time to time taken place, with, however, very little practical effect. This legislation is comprised in three statutes, the first of which was passed in 1803, the second in 1821, and the last in 1850. The first was the 43 Geo. 3, c. 138, and it enacted that all offences committed within any of the Indian territories, or parts of America not within the limits of either of the Provinces of Lower or Upper Canada, or of any civil government of the United States of America, shall be and be deemed to be offences of the same nature, and shall be tried in the same manner, and subject to the same punishment as if the same had been committed within the Provinces of Upper and Lower Canada. It also gave power to the Governor of Lower Canada to appoint persons to act as Justices in the Indian territories, for the purposes,

not of trying, but merely of hearing and committing for trial in Lower Canada; and the Governor of that Province, if the case seemed to require it, could order the trial to take place in Upper Canada. The second statute (1 & 2 Geo. 4, c. 66) extended the Act of 1803 to all the territories of the Hudson Bay Company. It conferred power on the Crown to appoint Justices of the Peace in those territories, in special terms, including the territories of the Hudson Bay Company, with power to such Justices to take evidence in the country, to be used in the Courts of Upper and Lower Canada. It gave further authority to the Crown to issue commissions under the Great Seal, empowering Justices to hold Courts of Record for the trial of criminal offences, notwithstanding anything contained in the Hudson Bay Company's charter. The times and places for holding these Courts were to be determined by His Majesty; but their power was not to extend to the trial of capital offences. The third in this series of statutes is the 22 & 23 Vic. c. 26. This Act recites the main provisions of the 43 Geo. 3, and of the 1 & 2 Geo. 4, and empowers the Crown, either by commission or Order in Council, to authorize such justices as might be appointed to try, in a summary way, all crimes, misdemeanors and offences whatsoever, and to punish by fine or imprisonment, or both. In cases punishable by death, or in which, in the Justices' opinion, fine and imprisonment were inadequate to the offence, they might either try the offender in the ordinary way, or send him to Upper Canada to be tried there, under the Act of Geo. 4, or if they saw fit, to British Columbia, to be tried by any Court having cognizance of like offences committed there. This last mentioned Act, however, in the final section, is declared not to extend to the territories of the Hudson Bay Company.

By an Order in Council following the 33 Vic. c. 3, the Province of Manitoba was formed out of the territories referred to in the above statutes, and by a statute of the Parliament of Canada (34 Vic. c. 14) the entire body of the modern criminal law of England, as existing in the rest of the Dominion, has been extended to this Province (*a*). Under the latter statute, the Imperial enactments above referred to, have been superseded as to the Province of Manitoba, and the justices in that Province have the same power and jurisdiction over persons charged with indictable offences committed therein, as justices in other parts of the Dominion have over persons committing offences within their several jurisdictions.

By s. 2, the Court known as the General Court has power to hear, try and determine, in due course of law, all treasons, felonies and indictable offences committed in any part of the said Province or in the territory which has now become the said Province. This statute assimilates the procedure in criminal cases to that existing in the other Provinces and obviates the necessity for any recourse to the Imperial statutes before mentioned.

Indeed it would seem that under this statute, and the British North America Act, 1867, the officers and courts in Manitoba have now exclusive jurisdiction over all offences committed therein.

It may be observed, before proceeding to treat of the representative assemblies existing in the several Provinces of the Dominion, that the Crown has power to create a local Legislative Assembly in a colony, whether conquered, ceded, or settled. (*b*)

In 1791, by the Imperial Act 31 Geo. 3, c. 31, the former Province of Quebec was divided into the two Pro-

(*a*) See charge of Mr. Justice *Johnson* to the Grand Jury, Spring Assizes, 1871.

(*b*) *Phillips v. Eyre*, L. R. 7 Q. B. 1. (Ex. Chr.)

vinces of Upper and Lower Canada, a separate Constitution and independent powers of legislation were granted to each, this power of legislation being vested in the Legislative Council and Assembly of each Province, and requiring the assent of the Crown, expressed through the Governor, to any measure becoming law. Prior to the passing of this statute, the legislative power was vested in the Governor and Council. In 1840, the 3 & 4 Vic. c. 35, made provision for the re-union of the Provinces of Upper and Lower Canada, and repealed the 31 Geo. 3, c. 31, as to the grant of a separate Constitution and legislative powers. It enacted that there should be within the Province of Canada one Legislative Council and one Assembly, to be called, "The Legislative Council and Assembly of Canada," and provided that Her Majesty should have power, by and with the advice and consent of the said Legislative Council and Assembly, to make laws for the peace, welfare, and good government of Canada, subject to certain limitations contained in the Act. From 1840 till the 1st of July, 1867, the right of legislation in the Provinces of Ontario and Quebec was founded on the Act of Union. On the 2nd of October, 1758, a Legislative General Assembly, having independent powers of legislation, was granted to the Province of Nova Scotia, of which New Brunswick then formed a part, (a) and on the 16th of August, 1784, a separate and distinct Legislative General Assembly, with the like rights, privileges and powers as had been before conferred on and enjoyed by the House of Assembly in Nova Scotia was granted to New Brunswick. (b)

By the British North America Act, 1867, the Provinces of Ontario, Quebec, Nova Scotia and New Brunswick,

(a) *Hill v. Weldon*, 3 Kerr, 43 per Chipman, C. J.

(b) *Ib.*, 44, per Chipman, C. J.

were federally united into one Dominion, under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution, to a great extent a written one, (a) and similar in principle to that of England. By this Act power is given to the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of Canada. The right to legislate as to the criminal law, including also the procedure in criminal matters, is vested in the Dominion Parliament, to the exclusion of the Local Legislatures of the several Provinces. The Act has, in this respect, entirely changed the Legislative Constitution of each Province; the Imperial Parliament has intervened, and, by virtue of its supreme legislative power, has taken from the subordinate legislative bodies of the Provinces the plenary powers to make laws which they formerly possessed. Where, under the terms of this Act, the power of legislation is granted to be exercised exclusively by one body, the subject so exclusively assigned is as completely taken from the others as if they had been expressly forbidden to act on it, and if they do legislate beyond their powers, or in defiance of the restrictions placed on them, their enactments are no more binding than rules or regulations promulgated by any other unauthorized body. (b) When, however, the Local Legislatures have power to legislate on any particular subject, it does not follow that they have no power to make any violation of their provisions in relation thereto a *crime* even in the technical sense of the term. No doubt it was intended that the Local Legislatures should not only have the power, but the exclusive right, to legislate on some subjects; and they have power to

(a) *Reg. v. Chandler*, 1 Hannay, 54, per *Ritchie*, C. J.

(b) *Ib.* 557, per *Ritchie*, C. J.

legislate so as to impose punishment, by way of fine or imprisonment, for enforcing the laws they make in relation to those subjects, although such legislation makes the act prohibited a *crime*. (a) In this case it was held that under s. 92, Nos. 9 and 16, of the British North America Act, 1867, the Local Legislature not only had the power but the exclusive right to legislate in relation to shop, tavern, and other licenses, in order to raise a revenue, and that, having such right of legislation on this subject, they had also power under No. 15 to enact that any person who, having violated any of the provisions of the Act, should compromise the offence, and any person who should be a party to such compromise should, on conviction, be imprisoned in the common gaol for three months, and that such enactment was not opposed to s. 91, No. 27, by which the criminal law is assigned exclusively to the Dominion Parliament. (b) But under No. 15, the punishment imposed by the Local Legislatures cannot be cumulative. It must be either fine, penalty, or imprisonment, and it cannot be both fine and imprisonment. (c)

In another case it has been held that, notwithstanding this section, an indictment signed by an advocate prosecuting for the crown, and as representing the Attorney-General for the Province of Quebec, and not as representing the Minister of Justice for the Dominion, is valid. (d)

By the 33 Vic. c. 3, a Constitution similar to that existing in the other Provinces was granted to Manitoba, a Legislative Council and Assembly were created, and certain powers of legislation conferred on them.

While on the subject of our new Constitution and the

(a) *Reg. v. Boardman*, 30 U. C. Q. B. 555-6, per *Richards*, C. J.

(b) *Ib.* 553.

(c) *Ex parte Papin*, 8 C. L. J. N. 122.

(d) *Reg. v. Downey*, 13 L. C. J. 193; see also *Reg. v. Reno and Anderson*, 4 U. C. P. R. 281; *Clemens, q. t. v. Bemer*, 7 C. L. J. N. S. 126. *Reg. v. Pattee*, 5 U. C. P. R. 292.

British North America Act, 1867, we may be permitted to treat of the powers which this Act confers on the Parliament of Canada to imprison for contempt, this being, in fact, a consideration of the English parliamentary law prevailing in the colonies. Under s. 18, taken in connection with the 31 Vic. c. 23, the Senate, House of Commons, and the members thereof respectively, now hold, exercise and enjoy the like privileges, immunities and powers enjoyed by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland at the time of the passing of the Act, including the power of imprisoning for contempt (a): and incident to this power there is vested in the Dominion Parliament the right of judging for itself what constitutes a contempt, and of ordering the commitment to prison of persons adjudged by the House to be guilty of a contempt and breach of privilege, by a general warrant, stating simply that a contempt has been committed, without setting forth the specific grounds of the commitment. (b)

The power of imprisoning for contempt inherent in the House of Commons in England, by virtue of the law and custom of Parliament, can only be conferred on colonial Assemblies by express grant. (c) As, therefore, no such grant has been made to the Local Legislatures of these several Provinces of the Dominion, they do not possess the powers enjoyed in this respect by the Senate and House of Commons.

There is no power to imprison for contempt annexed as a necessary incident essential to the existence of a Colonial House of Assembly, by the grant of a Constitution and independent legislative powers, nor is this

(a) See *The Speaker of the Legislative Assembly of Victoria, v. Glass*, L. R. 3 P. C. App. 560.

(b) *Ib.*

(c) *Ib* ; *Doyle v. Falconer*, L. R. 1 P. C. App. 328.

power conferred as a legal incident or attribute by law annexed to the grant of the Assembly, nor does it exist by analogy to the law and custom of Parliament as part of the common law inherent in the two Houses of Parliament in the United Kingdom, or to a Court of Justice, which is a Court of Record, a Colonial House of Assembly having no judicial functions. (a)

Nor does it make any difference whether the contempt is committed in the face of the House, while sitting, or out of it, by a member or by a stranger. In *Doyle v. Falconer*, a member while addressing the House was called to order by the Speaker; he then used contemptuous language to the latter while in the execution of his office, and after being formally adjudged guilty of contempt by the House, he was committed by the Speaker's warrant: *Held* that the commitment was illegal. But a power to *imprison* for contempt must be distinguished from the power to preserve order and remove obstructions in the House. The latter power is a necessary incident to the creation of a Colonial Legislative Assembly (b); and although the Local Legislatures in the several Provinces of the Dominion have no power to imprison by way of *punishing* a contempt, yet if a member of any of these Houses is guilty of disorderly conduct in the House while sitting, and it is necessary for the preservation of order that he should be removed, he may be excluded for a time, or even expelled. The law would sanction the use of that degree of force which might be necessary to remove the person offending from the House, and to keep him excluded. The same rule would apply *a fortiori* to obstructions caused by any person not

(a) *Doyle v. Falconer*, L. R. 1 P. C. App. 328; *Kielley v. Carson*, 4 Moore's P. C. cases, 63; *Fenton v. Hampton*, 11 Moore's P. C. cases, 347; *Hill v. Weldon*, 3 Kerr, 1 *et seq.*, overruling, *Re Tracey*, S. L. C. A. 479; *McNab v. Bidwell*, Draper, 152; *Beaumont v. Barrett*, 1 Moore's P. C. cases, 59.

(b) *Doyle v. Falconer*, L. R. 1 P. C. App. 328.



a member ; and whenever the violation of order amounts to a breach of the peace or other legal offence, recourse may be had to the ordinary tribunals. (a)

The difference between the Dominion and respective Local Legislatures, with regard to the power of imprisoning for contempt, arises from the fact that the Imperial Parliament has, by s. 18 of the Act above referred to, empowered the former to define their privileges and immunities, while no such authority has been conferred on the latter.

When the Imperial authorities grant to a colony a Representative Assembly, with independent powers of legislation and the privilege of self-government, they cannot recall or abridge the rights once conferred (b) : and the colonists will thereafter enjoy the right to legislate for themselves, subject in certain cases to the control of the Imperial Parliament. But a Colonial Act, repugnant to an Imperial statute or order made, by authority of such statute, applicable to the colony by express words or necessary intendment, is void so far as such repugnancy extends, and no farther. (c)

It has been held in several cases that the Imperial Parliament still retains power to enact laws binding upon the colonies (d) : and such laws are in force in the colonies, in so far as it was the intention of Parliament that these statutes should extend to them (e) : and as ceded colonies, any positive enactment of the mother country, or any mere act or regulation of the Queen, in the exercise of her royal prerogative, would have the force of law

(a) *Dogle v. Falconer*, L. R. 1 P. C. App. 340, per Sir J. W. Colvile.

(b) *Phillips v. Eyre*, L. R. 6 Q. B. 19, per Willes, J. (Ex. Chr.)

(c) *Ib.*, 20 per Willes, J. ; and see Imperial Stat. 28 & 29 Vic. c. 63, s. 2 ; *Reg. v. Sherman*, 17 U. C. C. P., 166.

(d) *Smith v. McGowan*, 11 U. C. Q. B. 399 ; *Gabriel v. Derbishire*, 1 U. C. C. P. 422.

(e) *Jouett v. Lockwood*, 2 Kerr, 683, per Chipman, C. J. ; and see Imp. Stat. 28 & 29 Vic. c. 63.

here. (a) The comity of nations, however, prevails to some extent between Colonial Parliaments and the tribunals of the mother country, and when the law of a colony conflicts with that of England in respect of acts done within the jurisdiction of the colony, if an action does not lie for a wrongful act in the colony, none can be maintained in England. (b)

It seems there are some subjects pertaining to the interests of the Empire at large, as well as our own Dominion, on which a right of legislation is reserved to the Imperial Parliament. Among these the foreign relations of the colonies may certainly be included.

In giving judgment in *Reg. v. Schram*, (c) after stating that by the Union Act, Imp. Stat. 3 & 4 Vic. c. 35, power was given to the Local Legislatures to pass laws for the peace, welfare, and good government of the Province of Canada, such laws not being repugnant to that Act, or to such parts of 31 Geo. 3, c. 31, as were not repealed, or to any Act of the Imperial Parliament, made, or *to be made*, and not thereby repealed, which did or should by express enactment, or by necessary intendment, extend to the Provinces of Upper or Lower Canada, or either of them, *Richards*, C. J., said: "The very words of the statute 3 & 4 Vic. c. 35, seem to imply that the power to legislate on some matters was and is reserved to the Imperial Parliament, though this Province may be affected by such legislation. As long as it is admitted that the Home Government, by whom the supreme power of the empire is exercised, is the proper channel through which all our relations and intercourse with foreign governments are to be carried on, the power to pass laws to bind the whole nation, so far as regards those relations,

(a) *Doe dem Anderson v. Todd*, 2 U. C. Q. B. 83-4; per *Robinson*, C. J.

(b) *Phillips v. Eyre*, L. R. 4 Q. B. 225.

(c) 14 U. C. C. P. 322.

must rest with the Imperial Parliament. Independently of the doctrine that our Local Legislature can only exercise such powers as are specially conferred upon it under the statutes passed by the Imperial Parliament, there are other points of view in which the question may be considered. Though possessing a domestic Legislature, we form part of a vast empire having other colonies exercising similar legislative powers to our own. If any one colony by passing laws, or refusing to pass laws, produced a state of things which created difficulty with a foreign state, the whole nation might be involved in a calamitous war from the imprudence or recklessness of an unimportant colony." The question, in this case was whether the Imp. Stat. 59 Geo. 3, c. 69 could be held to apply here, and the learned Judge went on to say : " Considered in the above view, it appears to me that the statute which we are discussing relates to the conduct of citizens of the empire towards foreign states and peoples, and is on a subject which must be disposed of and legislated upon by the Imperial Parliament, as representing the supreme legislative power of the nation, and as to which it is necessary that all the subjects of the Crown should alike be bound." (a) In this case the defendants were convicted of a misdemeanor under the above statute, 59 Geo. 3, c. 69, for procuring and endeavouring to procure enlistments in this country for the army of the United States, and upon motion for a new trial it was held that although at the time of the passing of the statute we had a Local Parliament and separate powers of legislation, yet it was in force in this Province, and the conviction was sustained and the statute held to apply here. (b)

If, after the grant of a Constitution and independent

(a) 14 U. C. C. P. 322.

(b) *Ib* 318 ; see also *Reg. v. Sherman*, 17 U. C. C. P. 166.

powers of legislation, an English statute is introduced into a colony, though afterwards repealed in England, it will still continue to apply in the colony. (a) The reason is that none of the provisions of the repealing statute, which are substituted for the repealed statute, extend to the colony (b) : Imperial statutes not extending thereto, unless expressly named, or the statute is of such universal application as manifestly to apply therein. (c)

In the early settlement of a colony, when the Local Legislature has been just called into existence, and has its attention engrossed by the immediate wants of the members of the infant community in their new situation, the courts of judicature would naturally look for guidance, in deciding upon the claims of litigants, to the general laws of the mother country, and would exercise greater latitude in the adoption of them than they would be entitled to do as their Local Legislature, in the gradual development of its powers, assumed its proper position. Every year should render the courts more cautious in the adoption of laws that had never been previously introduced into the colony (d) : and in accordance with these principles it was held in this case that increasing lapse of time since the settlement of the colony should render courts more cautious in recognizing English statutes which have not been previously introduced. (e) It is suggested as even worthy of grave consideration whether, after the existence of an independent legislature for nearly a century, the adoption of English statutes is not rather the province of the legislature than of the courts. (f)

(a) *Dunne v. O'Reilly*, 11 U. C. C. P. 404 ; *Reg. v. Roblin*; 21 U. C. Q. B. 352 ; *Kelly v. Jones*, 2 Allen, 473.

(b) *Kerr v. Burns*, 4 Allen, 609 ; following *James v. McLean*, 3 Allen, 164.

(c) See Imp. Stat. 28 & 29 Vic. c. 63.

(d) *Uniacke v. Dickson*, 1 James, 291 ; per *Haliburton*, C. J.

(e) *Ib.* 287.

(f) *Ib.* 291, per *Haliburton*, C. J.

There is no precise or defined rule, nor any direct decision as to what Imperial statutes extend to the colonies. This must of necessity be left open for decision in each particular colony and case by the courts established in those colonies, subject to an appeal to Her Majesty in Privy Council. (a) The courts are not, in deciding, to proceed upon any arbitrary exercise of their will, but upon the best views which they can take of arguments which cannot in their nature lead to any clear and incontestible conclusions, and they are to so decide, subject to the revision and control of the Queen in Council, and subject also to any express provision which the Legislature of the mother country or the colony may think fit to make. (b) The ultimate and final forum to decide as to what particular laws are in force is the Privy Council. (c)

When the law of England is introduced into a colony by some positive enactment of the mother country, or, as may be done in the case of a conquered country, imposed by the mere act or regulation of the Queen in the exercise of her royal prerogative, the extent of its introduction must depend upon the terms of the Act or regulation introducing it (d): but the 32 Geo. 3, c. 1, introducing the civil law of England into the Province of Ontario does not place its introduction on a footing materially different, as regards extent of introduction, from what was the effect of the proclamation of the 7th October, 1763, in those territories to which it extended, or from the footing on which the laws of England stand in those colonies in which they are merely assumed to be in force on the principles of the common law, by

(a) *Uniacke v. Dickson*, 1 James, 299, per Hill, J.; *Ex parte Rousse*, S. L. C. A. 322: per Sewell, C. J.; *Dillingham v. Wilson*, 6 U. C. Q. B., O. S. 86, per Sherwood, J.

(b) *Doe dem Anderson, v. Todd*, 2 U. C. Q. B. 87-8, per Robinson, C. J.

(c) *Ib. Uniacke v. Dickson*, 1 James, 287.

(d) *Doe dem Anderson v. Todd*, 2 U. C. Q. B. 83; per Robinson, C. J.

reason of such colonies having been first inhabited and planted by British subjects. (a) It would seem, therefore, we may reasonably assume the 14 Geo. 3, c. 83, and the 40 Geo. 3, c. 1, do not introduce the English criminal law to any other or greater extent than it was introduced, by the proclamation of 1763, into the Province of Quebec or than the English civil law was introduced by the 32 Geo. 3, c. 1, into the Province of Ontario; and that as to extent of introduction there is no material difference between colonies in which it is held to be in force on common law principles and those in which it is introduced by an express statute or proclamation. In each case only such laws as are of general and universal application, and adapted to the circumstances of the colony, can be held to be in force. (b) We may therefore conclude that the several Provinces of the Dominion stand on pretty much the same footing in regard to the extent of the introduction of the English criminal laws.

There seems to be a distinction between the common and the statute law extending to the colonies. As a code colonists have been disposed to adopt the whole of the former, with the exception of such parts only as are obviously inconsistent with their new situation; whilst far from being inclined to adopt the whole body of the statute law, they hold that such parts only are in force as are obviously applicable to and necessary for them. As respects the common law, the exclusion forms the exception, whereas as to the statute law the reception forms the exception. (c) It must, therefore, be quite clear that an English *statute* is applicable and necessary in a colony before it is held to be in force. (d) In this case it was ac-

(a) *Ib.* 86; per *Robinson*, C. J.

(b) *Ib.* 86; per *Robinson*, C. J.

(c) *Uniacke v. Dickson*, 1 James, 289, per *Halliburton*, C. J.

(d) *Ib.* 289 per *Halliburton*, C. J.

cordingly held that the whole of the English *common law* will be recognized as in force, excepting such parts as are obviously inconsistent with the circumstances of the country, while on the other hand none of the *statute law* will be received except such parts as are obviously applicable and necessary. (a)

The learned Chief Justice goes on to remark that this distinction rests in the very nature of things, and is derived from the origin of the two codes. The common law has its foundation in those general and immutable principles of justice which should regulate the intercourse of men with men wherever they reside. The statute law emanates from the wisdom of the legislature of the day, varies with varying circumstances, and consists of enactments which may be beneficial at one time and injurious at another—which might advance the interests of one community and prove ruinous to those who were differently situated. (b)

Whether the several Provinces of the Dominion be considered as acquired by occupancy or cession, it is quite clear, from numerous authorities, that only such laws as are applicable and necessary to the circumstances and condition of the colonies have been introduced. (c) Local statutes adapted solely to England, or such as have been passed upon grounds or for reasons peculiar to the mother country, do not apply here. (d)

English statutes of general and universal application, regulating the ordinary affairs of life, apply to the colo-

(a) *Ib.* 287

(b) *Ib.* 290.

(c) *Shea v. Choat*, 2 U. C. Q. B. 211; *Wilson v. Jones*, 1 Allen, 658; *Kerr v. Burns*, 4 Allen, 605; *Smyth v. McDonald*, 1 Oldright, 274; *Leith v. Willis*, 5 U. C. Q. B. O. S. 102-3; per *Robinson*, C. J.; *Dillingham v. Wilson*, 6 U. C. Q. B. O. S. 85; *Uniacke v. Dickson*, 1 James, 287; *Doe dem. Anderson v. Todd*, 2 U. C. Q. B. 82.

(d) *Reg. v. Row*, 14 U. C. C. P. 307; *Ex parte Rousse*, S. L. C. A. 321; *Doe dem. Anderson v. Todd*, *supra*, *Kavanagh v. Phelon*, 1 Kerr, 472-6; *Doe dem. Hannington v. McFadden*, Berton, 153.

nies, and in some cases, even where an act is only impliedly made an offence in England. There are several cases in which summary convictions have been upheld in Ontario upon English statutes, which are not otherwise in force than as they were considered to have been introduced under our general adoption of the criminal law, although the act done was not otherwise made an offence in England than by its being positively prohibited by statute and a penalty imposed upon conviction before the magistrates, with imprisonment in case of the penalty not being paid. (a) And the learned Chief Justice further observes, "I by no means mean to say that all such Acts have been held to form part of our criminal law, for there are cases in which reason has pointed out obvious grounds for exception, as in the instance of particular regulations made for the method of carrying on certain manufactures. But where acts have been prohibited under a penalty, from their tendency to lead to vice and immorality, as in the instance of Sabbath breaking and gambling, the English statutes respecting them, which were in force in 1792, have been treated as being in force here. And our statute, 11 Geo. 4, c. 1, was passed to obviate the practical inconvenience we were under in enforcing such Acts, by reason of the penalty, or a portion of it, being in many cases appropriated to the poor of the parish, or in some other manner not exactly applicable to the existing state of things here. (b) It was held in this case that, notwithstanding the 19 Vic. c. 49, passed in this Province, the 12 Geo. 2, c. 28, as to lotteries, is in force here; first, because it comes within our adoption of the criminal law of England as it stood in 1792, and next, because this statute and other

(a) *Cronyn v. Widder*, 16 U. C. Q.B. 361, per *Robinson*, C. J.

(b) *Cronyn v. Widder*, 16 U. C. Q. B. 361, per *Robinson*, C. J.



statutes of the same nature, and resting on the same footing, have been treated in our courts as being in force. (a)

By the 14 Geo. 3, c. 83, the British Parliament clearly designed to give to Canada the criminal law of England as to those objects and in those matters for which no special provision had before been made by Parliament, but it had no intended reference to, nor did it introduce, Acts of Parliament which, from their very terms, already were as much in force in the colonies as in England, and which consequently required no introduction at that period. (b) This statute introduced only that portion of the criminal law of England which was of universal application, and not such parts as were merely municipal and of local importance (c): but it was introduced in *toto* in law as well as in practice. (d)

The 40 Geo. 3, c. 1, did not apply to or introduce Acts which were already in force in the Province of Ontario. (e)

As somewhat illustrating the principles already explained, we now proceed to refer to cases in which particular criminal statutes have been held to be in force, giving, as far as possible, the reason upon which the decision in each case proceeded.

The statute 32 Henry 8, c. 9, which prohibits the buying of disputed titles, is in force in Ontario, as it constitutes part of the criminal law of England adopted by the 40 Geo. 3, c. 1 (f). In the case of *Shea v. Choat* (g), it was

(a) *Ib.* 356-361; see also as to lotteries and the 12 Geo. 2, c. 28; *Corby v. McDaniel*, 16 U. C. Q. B. 378; *Marshall v. Platt*, 8 U. C. C. P. 189; *Lloyd v. Clark*, 11 U. C. C. P. 250, per *Draper*, C. J.; *Mewburn v. Street*, 21 U. C. Q. B. 306-498.

(b) *Bank of Upper Canada v. Bethune*, 4 U. C. Q. B. O. S. 171 per *Robinson*, C. J.; see also *Bank of Montreal v. Bethune*, 4 U. C. Q. B. O. S. 193.

(c) *Ex parte Rousse*, S. L. C. A. 321.

(d) *Notman v. Reg.* 13 L. C. J. 257 per *Badgley*.

(e) *Bank of Upper Canada v. Bethune*, 4 U. C. Q. B. O. S. 171-2, per *Robinson*, C. J.

(f) *Beasley q. t. v. Cahill*, 2 U. C. Q. B. 320; see also *Baldwin q. t. v. Henderson*, 3 U. C. Q. B. 287; *Benna, q. t. v. Eddie*, 2 U. C. Q. B. 286; *Aubrey, q. t. v. Smith*, 7 U. C. Q. B. 213; *May, q. t. v. Dettrick*, 5 U. C. Q. B. O. S. 77; *Ross, q. t. v. Meyers*, 9 U. C. Q. B. 284; *McKenzie v. Miller*, 6 U. C. Q. B. O. S. 459; *Smith v. Hall*, 25 U. C. Q. B. 554.

(g) 2 U. C. Q. B. 211.

held that the statute 5 Eliz., c. 4, is not in force in Ontario, but the statute 20 Geo. 2, c. 19, is, though both statutes are of a date long anterior to the introduction of the English law in this Province. In giving judgment in this case the learned Chief Justice *Robinson* says, in reference to the 5 Eliz. c. 4, that "it cannot possibly admit of doubt that its provisions are inapplicable to any state of things that ever existed here. A clause here and there might be carried into effect in this colony, or anywhere, from the general nature of their provisions, but that is not sufficient to make such a statute part of our law, when the main object and tenor of it is wholly foreign to the nature of our institutions, and is therefore incapable of being carried substantially and as a whole into execution. (a)

The 28 Geo. 3, c. 49, s. 1, as to perjury, is local in its character, and therefore is not in force here. (b)

In *Reg. v. Mercer*, (c) it was held that the 5 & 6 Edw. 6, c. 16, against buying and selling offices, is in force in this country, under the 40 Geo. 3, c. 1, as part of the criminal law of England. The 49 Geo. 3, c. 126, applies here and expressly extends the 5 & 6 Edw. 6, c. 16, to the colonies, or at least such of its provisions as are in their nature applicable. (d) *Semble*, the 3 Edw. 1, c. 26, is in force here. (e)

The 1 W. & M. c. 18, s. 18, is in force here, notwithstanding the Con. Stats. Can. c. 92, s. 18, and a person offending against the former statute may be punished. (f)

The 32 Geo. 3, c. 1, introducing the law of England as to property and civil rights into the Province of Ontario,

(a) *Ib.* 221.

(b) *Reg. v. Row*, 14 U. C. C. P. 307.

(c) 17 U. C. Q. B. 602.

(d) *Ib.*; see also *Reg. v. Moodie*, 20 U. C. Q. B. 389; *Foot v. Bullock*, 4 U. C. Q. B. 480.

(e) *Astin v. London District Council*, 1 U. C. Q. B. 292.

(f) *Reid v. Inglis*. 12 U. C. C. P. 195; per *Draper*, C. J.

included the law generally which related to marriage, that is, the common and statute law of England applicable to the state of things existing in this colony at the time the Act was passed. The stat. 26 Geo, 2, c. 33, being in force in England when our stat. 32 Geo. 3, c. 1, became law, was adopted, as well as other statutes, so far as it consisted with our civil institutions, being part of the law of England at that time "relating to civil rights." It would seem, however, that the 11th clause of 26 Geo. 2, c. 33, is not in force in this country. (a)

The 8 Henry 6, c. 9, 6 Henry 8, c. 9, and 8 Henry 4, c. 9, and 21 James 1, c. 15, as to forcible entry, are in force here (b): so the 8 & 9 Wm. 3, c. 27 (c): so the 33 Henry 8, c. 20 (d): so the Mutiny Act, 25 Vic. c. 5, s. 72 (e): so by the 14 Geo. 3, c. 83, the 9 Geo. 1, c. 19, and 6 Geo. 2, c. 35, which impose certain penalties on persons selling foreign lottery tickets, have been made to form part of the law of Quebec. (f)

(a) *Reg. v. Roblin*, 21 U. C. Q. B. 352-5; *Hodgins v. McNeil*, 9 Grant, 305; 9 U. C. L. J. 125; *Reg. v. Secker*, 14 U. C. Q. B. 604; but see *Reg. v. Bell*, 15 U. C. Q. B. 287.

(b) *Boulton v. Fitzgerald*, 1 U. C. Q. B. 343; *Rex. v. McGreary*, 5 U. C. Q. B. O. S. 620.

(c) *Wragg v. Jarvis*, 4 U. C. Q. B. O. S. 317.

(d) *Doe dem. Gillespie v. Wixon*, 5 U. C. Q. B. 132.

(e) *Reg. v. Dawes*, 22 U. C. Q. B. 333.

(f) *Ex parte Rousse*, S. L. C. A. 321.

See further on the general subject *Hesketh v. Ward*, 17 U. C. C. P. 667; *Mercer v. Hewston*, 9 U. C. C. P. 349; *Heartly v. Hearn*, 6 U. C. Q. B. O. S. 452; *Torrance v. Smith*, 3 U. C. C. P. 411; *James v. McLean*, 3 Allen, 164; *Marks v. Gilmour*, 3 Allen, 170-217; ex parte *Bustin*, 2 Allen, 211; *Fish v. Doyle Draper*, 340; *Purdy q. t. v. Ryder Taylor*, 236; *Reg. v. Street*, 1 Kerr, 373; *doe dem Allen v. Murray*, 2 Kerr, 359; *Milner v. Gilbert*, 3 Kerr, 617; *Morrison v. McAlpine*, 2 Kerr, 36; ex parte *Ritchie*, 2 Kerr, 75; *Reg. v. McCormick*, 18 U. C. Q. B. 131; *Pringle v. Allan*, 18 U. C. Q. B. 578; *Warner v. Tyson*, 2 L. C. J. 105; *Reg. v. Beveridge*, 1 Kerr, 58; *Reg. v. Street*, 1 Kerr, 373; *Atty. General v. Warner*, 7 U. C. Q. B. 397.

## EXTRADITION.

For the purposes of this chapter, it may be said that where, upon a requisition by the Government of Canada or the United States, a person found within the territories of either nation, charged with murder, assault, with intent to commit murder, piracy, arson, robbery, the utterance of forged paper, or forgery committed within the jurisdiction of the other, is delivered up to justice, pursuant to the Ashburton Treaty, and the statutes passed to give effect thereto, the surrender under such circumstances is called *extradition*.

Jurists are not unanimous on the question whether in the absence of treaty stipulations there is any obligation recognized between nations to make such surrender. But the better opinion seems to be that, in an international point of view, the extradition of criminals is a matter of comity, and not of right, except in cases specially provided for by treaty. (a) The law of England does not recognize it as an international duty in the absence of treaty stipulations, and the *Habeas Corpus* Act, 31 Car. 2, c. 2, s. 12, in effect prohibits it in the case of subjects, except fugitives from one part of Her Majesty's dominions to another. (b)

Both Great Britain and the United States maintain, upon principles of international law, irrespective of treaty, that the surrender of foreign criminals cannot be demanded. Hence the necessity for a treaty on the subject, which can only be made by the treaty-making

(a) *Re Anderson*, 11 U. C. C. P., 61 per *Richards*, J. *Reg. v. Bennet H. Young*, 9 L. C. J., 44 per *Badgley*, J.

(b) *Reg. v. Tubbee*, 1 U. C. P. R., 102-3, per *Macaulay*, C. J.

power of the nation. (a) This necessity was practically acknowledged at an early date by the making of an extradition treaty between the two governments on the 19th of November, 1794. This treaty was called "Jay's treaty," and it related only to murder and felony. It has long since been superseded by the Ashburton treaty, and the statutes passed to give effect thereto, though it continued in force till the outbreak of the American war in 1812. It ceased as soon as war was declared, and from the conclusion of the treaty of peace between Great Britain and the United States until the passing of the 3 Wm. 4, c. 6, in 1833, the extradition of criminals between the two countries rested entirely upon state authority and the general law of nations. (b)

The first case which was decided in this country on the subject of extradition, was *Re Fisher*, (c) decided in 1827. Jay's treaty was not then in force in Quebec, and the decision proceeded on the general principles of international law. The Court held that the executive government had power to deliver up to a foreign state a fugitive from justice charged with having committed any crime within its jurisdiction. In another case, in 1833, Lord Aylmer, then Governor of Canada, refused to deliver up four prisoners for extradition, saying the Executive could not, in the absence of treaty or legislation on the subject, dispense with the *Habeas Corpus* Act. But, in the same year, Ontario remedied this defect by passing the 3 Wm. 4, c. 6, Con. Stat., U. C., c. 96.

In relation to foreign powers with whom no treaty or conventional arrangement exists, this latter statute is still in force, and limits any authority or discretion which might otherwise have existed on the principles of the common

(a) *Reg. v. Bennet H. Young* 9 L. C. J., 44 per *Badgley*, J.

(b) See *Judgment of Macaulay*, C. J. *Reg. v. Tubbee*, 1 U. C. P. R. 100-1.

(c) S. L. C. A. 245.

law, or international comity, to cases embraced therein, and the mode of proceeding therein pointed out. Some doubt, however, exists as to how far the United States, Quebec, or England would respect this statute, if a fugitive surrendered by Ontario to a foreign power were taken through those countries. (a)

The extradition of criminals is now regulated by the Ashburton Treaty or Treaty of Washington, and the statutes passed to give effect thereto. The Treaty was signed at Washington on the 9th of August, 1842, by Lord Ashburton, on behalf of Great Britain, and Daniel Webster, on behalf of the United States. The ratifications were exchanged at London on the 30th of October following. This Treaty was passed for purely national purposes. (b) It contains the whole law of surrender between Canada and the United States (c); and, in the opinion of *Macaulay*, C. J., the power of surrender which might otherwise exist on the general principles of international law, is circumscribed and limited by the Treaty and statutes, and no discretion can now be exercised by the Government in the surrender of fugitives in other cases either under the Con. Stat., U. C., c. 96, (which he considered suspended during the continuance of the treaty, so far as the United States are concerned); or by virtue of any common international law prerogative or state authority or comity which might have otherwise prevailed. (d)

Immediately on the ratification of the Treaty, the necessity of legislation for the purpose of carrying its provisions into complete effect, was felt by each of the high contracting parties. The English Legislature, on the

(a) *Reg. v. Tubbee*, 1 U. C. P. R. 98.

(b) *Reg. v. Bennet H. Young*, *The St. Alban's Raid*, 167 per Smith, J.

(c) *Reg. v. Tubbee*, 1 U. C. P. R. 98.

(d) *Id.*, 102.

22nd of August, 1843, passed the 6 & 7 Vic., c. 76, entitled "an Act for giving effect to a treaty between Her Majesty and the United States of America, for the apprehension of certain offenders." This enactment is not now in force in Canada. It was suspended on the 28th of March, 1850, and the suspension was directed to continue so long as our substituted enactment (then the 12 Vic., c. 19) should remain in force. It has not since been revived by the repeal or consolidation of any of our statutes, and it will continue suspended so long as Canadian legislation exists on the subject of extradition. (a) No local statute for carrying out the provisions of the Treaty has been passed in Nova Scotia or New Brunswick; and, up to the 8th of August, 1868, the 6 & 7 Vic., c. 76 was in force, and regulated the proceedings under the treaty in those Provinces. From the latter date, however, this statute must be regarded as suspended therein under the proclamation of his Excellency the Governor-General, introducing the 31 Vic., c. 94. (b)

The next Imperial enactment affecting this Colony is the 25 Vic., c. 20, which provides that no writ of *Habeas Corpus* shall issue out of any court in England to any Colony or foreign dominion of the Crown in which any courts exist having power to issue and ensure the due execution of such writs. In the *Anderson* case, hereinafter referred to, after the Judges of the Queen's Bench in Ontario had refused to discharge the prisoner, an application was made to the Court of Queen's Bench in England for a writ of *Habeas Corpus* to bring up the body of Anderson, and the writ was granted. (c) This action of the English Courts caused much complaint in Canada, as being an unwarranted interference with our

(a) *Reg. v. Bennet H. Young*, 9 L. C., J., 29.

(b) See the above case.

(c) See *Ex parte Anderson*, 3 L. T. Reps. N. S. 622, 7 Jur. N. S. 122.

judicial prerogatives, and the above statute was passed to prevent future proceedings of a like kind by the Imperial authorities.

The 5th section of the Imp. statute 6 & 7 Vic., c. 76, gave the Parliament of this country supreme authority to enact laws, and effectually carry out the provisions of the Treaty within the limits of our territory. (a) But Colonial legislative action was allowed only for the purpose of carrying into effect the objects of the Imperial Act within the Colonial jurisdiction, according to the local circumstances and position of each Colony and Dependency.

This delegated power of local legislation was therefore absolute in its nature, but restricted in its purport and extent by the objects of the Imperial Act. These objects once secured by the local law, the *procedure*, or, in other words, the machinery for obtaining its required purposes, was left to the discretion of the Local Legislature, to be provided for according to the circumstances and position of each Colony; (b) and the *procedure* under the Treaty may be changed by our Legislature. (c)

In pursuance of the powers thus conferred, provision was afterwards made by our Legislature for giving effect to the Treaty by the enactment of the 12 Vic. c. 19. (d) This statute, after reciting certain inconveniences which had arisen from the English Act, in effect enacted sections 2, 3, and 4 of the latter, with this *addition*, that section 2 of our Act sanctioned a requisition from the United States, or "any of such States."

No further change was made until the passing of the 23 Vic., c. 41, in 1860. This Statute repealed the Con.

(a) *Reg. v. Bennet H. Young*, 9 L. C. J. 38, per Smith, J.

(b) *Ib.* 45, per Badgley, J.

(c) *Ib.*

(d) *Con. Stat. Can.*, c. 89.



Stats. U. C., c. 96; but the latter is still to some extent in force, as before explained. In 1861, the 24 Vic., c. 6, was passed. This Act did not require the Queen's proclamation, or an order of Her Majesty in Privy Council, to give it effect, but had the force of law here without either. (a) The Statute was passed in consequence of the legal complications arising in *Anderson's* case. (b) In order to avoid, if possible, the blunders of ignorant and incompetent magistrates, the Act deprived ordinary Justices of the Peace of the power to deal with extradition offences, and vested it only in superior officers of the Courts, such as Judges of the Superior or County Courts, Recorders, Police or Stipendiary Magistrates. It repealed the 1st, 2nd, and 3rd sections of the Con. Stat. Can., c. 89, and substituted other provisions in lieu thereof. These substituted sections applied only to the technical procedure of the local law, by giving practical, improved, and additional facilities for carrying out the law, and in this respect were simply verbal amendments *in eodem sensu* of the previously existing enactments. (c) The Act has omitted the words "any such States," which in the prior Acts were superfluous, and their omission in this Act renders it more perfectly conformable with the terms of the Treaty and of the Imperial Act, and with the delegated power of legislation by the Colonial Legislature: (d) for by the terms of the Treaty and the Imperial Act, "jurisdiction" and "territories" are synonymous, and the addition of the words "or of any such States" would be useless, as being, in fact, included in the general aggregate expression "United States of America." (e)

These words are not in the Imperial Act, and it seems

(a) *Reg. v. Bennet H. Young*, 9 L. C. J. 29.

(b) 20 U. C. Q. B. 124.

(c) *Reg. v. Bennet H. Young*, 9 L. C. J. 48, per *Badgley*, J.

(d) *Ib.* 49, per *Badgley*, J.

(e) *Ib.* 51, per *Badgley*, J.

our Legislature exceeded its authority in introducing them into the 12 Vic., c. 19. The mistake probably arose from a desire more fully to explain that the word jurisdiction used in the Treaty was to extend over the several States in the same sense in which it was used when applied to the United States. (a) In this case it was strongly contended that these words were necessary in the Statute—that the jurisdiction of the United States, and that of the several States, are separate and independent of each other, and that the omission of these words necessarily and intentionally restricted the operation of the Ashburton Treaty to offences committed solely within the jurisdiction of the United States, and that when the offence was committed within the limits of any one of the States, it was not covered by the Treaty.

The Court, in holding as already shown, declared that the surrender of persons for imputed crimes can only be made by the supreme executive authority of independent nations, and that in the United States it existed in the supreme Federal Legislature of the nation, and thus, as the object of the Treaty could only be attained by the national power, it did not reside in any one of the United States. (b)

In the Treaty and the Statutes, the words *jurisdiction* and *territories* are used concurrently and correlatively, and these general designations necessarily had reference to the aggregate dominions and territories of the high contracting parties—the General Governments of each—the United Kingdom of Great Britain and Ireland, with its Dependencies and Colonies on the one part, and the Federated General Government of the United States, with its State Governments, on the other, as aggregate

(a) See *Reg. v. Bennet H. Young. The St. Alban's Raid*, 169, per Smith, J.

(b) 167-9 per Smith, J.

territories over which their respective general public authority prevailed. (a)

The Act also makes two alterations in the rules of procedure. The evidence produced before the Magistrate was not to be "sufficient to sustain the charge according to the laws of this Province," but "such as, according to the laws of this Province, would justify the apprehension and committal for trial of the person accused," etc.

The language of Robinson, C.J., in the Anderson case, (b) shews that, according to the proper construction of the Treaty, the former expression has the same meaning as the latter; and as the Statute used the former only, probably it was amended so as not to conflict with the Treaty in this respect.

The Chief Justice says:—

"It will be observed that in one part of the treaty, as recited in the statute, the evidence of criminality is required to be such as would justify *the apprehension of the party and his commitment for trial*, if the offence had been committed in the country where he is found; while in another part the evidence is required to be such as shall be deemed sufficient *to sustain the charge*. It would seem that nothing can turn upon this variation of expression but we must look upon the same thing as intended by both; for in the treaty, as recited in the commencement of the statute, it is declared to have been agreed by the two powers that offenders charged with certain offences flying from one country into the territories of the other, should be *delivered up to justice*, 'provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive so charged shall be found, *would justify his apprehension and*

(a) *Reg. v. Bennet H. Young*, 9 L. C. J. 50, per Badgley, J.

(b) 20 U. C. Q. B. 168.

*commitment for trial if the crime or offence had been there committed.* This shews that nothing more can be meant by the other form of expression than by this, since by the treaty evidence sufficient *to commit the party for trial* is all that is required to warrant his being given up, and it would not be reasonable to require more.'”

The other alteration is in the second clause, and consisted in omitting the words, “*or under the hand of the officer or person having the legal custody thereof.*” (a) All the above points apply to the present Act, for on reference to them, it is in substance the same as the 24 Vic., c. 6.

The next statute on the subject is the 31 Vic., c. 94, (b), which came into operation on the 8th of August, 1868. This statute was passed to extend the *provisions* of the 24 Vic., c. 6, to the whole Dominion. (c) It superseded and repealed the Con. Stat. Canada, c. 89, and the 24 Vic., c. 6, and is now the governing enactment on the subject of extradition throughout the Dominion. So much of the first section of this Act as is in the words following, that is to say “*or any police magistrate or stipendiary magistrate in Canada, or any judge of the sessions of the peace in the Province of Quebec, or any inspector and superintendent of police empowered to act as a justice of the peace in the Province of Quebec,*” was repealed by the 33 Vic., c. 25.

It now becomes advisable to consider how the Treaty and statutes are to be construed and carried out in order to effectuate the objects they were designed to accomplish. These were the surrender by each country to the other of fugitives from justice charged with certain spe-

(a) See 31 Vic., c. 94, s. 2.

(b) See Stat. 1869, Reserved Acts.

(c) *Reg. v Morton*, 19, U. C. C. P. 21; per Wilson, J.

cified crimes (a); and thereby to subject parties against whom a charge coming within the Treaty and statutes is sustained by evidence of criminality to be put upon trial before the proper tribunal of the country where the offence was committed (b); and thus to prevent the failure of justice which would naturally result from offenders in one country seeking refuge in the other, and there being amenable to no punishment: for by the principles of the Common Law pervading the jurisprudence of both Great Britain and the United States, crimes are unquestionably considered local, and cognizable exclusively within the country where they are committed. (c)

Extradition laws are to be interpreted by the law of nations, in so far as the obligations created by them on the part of one nation to another are concerned; and the then existing public law of both nations forms an essential part of the national compact which is created by the passage of an extradition treaty. Consequently, on the passing of our extradition Acts, the public law of Great Britain, as well as the public law of the United States, became incorporated into the national compact. (d)

The words of this Treaty should not be held to too narrow a construction; and if the words used to carry out a design of general utility can properly be construed so as to give effect to and not defeat that design, the larger construction must be adopted. (e) The Treaty must be construed in a liberal and just spirit; not labouring with legal astuteness to find flaws or doubtful meanings in its words, or in those of the legal forms re-

(a) *Reg. v. Morton*, 19 U. C. C. P. 18 per *Hagarty*, J.

(b) *Reg. v. Reno and Anderson*, 4 U. C. P. R. 299, per *Draper*, C. J.; the *Chesapeake* case, 44, per *Ritchie*, J.

(c) *Ib.* 44, per *Ritchie*, J.

(d) *Reg. v. Bennet H. Young*; the *St. Alban's Raid*, 469, per *Smith*, J.

(e) *Re Warner* 1 U. C. L. J. N. S. 18, per *Hagarty*, J.

quired for carrying it into effect. Its avowed object is to allow each country to bring to trial all prisoners charged with the expressed offences, and it is based on the assumption that each country should be trusted with the trial of offences committed within its own jurisdiction. We are to regard its avowed object in construing its provisions. (a) We should look to it for an indication of what was probably meant by anything that may seem ambiguous in the language of the statute. (b)

The Treaty applies to all persons being subjects of both nations, and as well slaves as freemen. (c) The words of the 31 Vic., c. 94, are large enough to embrace all persons, subjects, denizens, or aliens, who have committed the crimes enumerated in the United States, and who are found in this Province; and a British subject committing one of the crimes enumerated in the Treaty, within the jurisdiction of the United States, and afterwards fleeing to Canada, is subject to the provisions of the Treaty, and the Statutes which provide for the surrender of "all persons" who, being charged, etc. (d) So a person *convicted* of forgery, or uttering forged paper, in the United States, who escapes to Canada after verdict, but before judgment, is liable to be surrendered, although, technically speaking, after judgment, or verdict of guilty, a man is incorrectly spoken of as "charged with a crime" in the language of the Statute. (e) But political offenders have always been held to be excluded from any obligation of the country in which they take refuge to deliver them up, whether such delivery is claimed to be due

(a) *Re B. G. Burley*, 1 U. C. L. J. N. S. 49-50, per *Hagarty, J.*; and see *Reg. v. John Paxton*, 10 L. C. J., 216, per *Drummond, J.*

(b) *Re Anderson*, 20 U. C. Q. B. 160, per *Robinson, C. J.*

(c) *Re Anderson*, 20 U. C. Q. B. 124, 11 U. C. C. P. 1.

(d) *Re Bennet G. Burley*, 1 U. C. L. J. N. S. 34; *Ib.* 20.

(e) *Re Warner*, 1 U. C. L. J. N. S. 16.

under friendly relationship, or under treaty, unless, in the latter case, the treaty expressly includes them. (a)

The Treaty, in express terms, includes seven different offences—namely, murder, assault with intent to commit murder, piracy, arson, robbery, forgery, and the utterance of forged paper. These offences are not political, but social, though the Governments of Great Britain and the United States have made national laws for each respectively, thereby giving them a municipal legal character. (b) The stipulations of the Treaty, with regard to the definitions of the crimes covered by it, are to be carried out in conformity with the municipal laws of both countries, in so far as they agree. (c)

The Governments of these two countries, in making the Treaty, were dealing with each other upon the footing that each had at that time recognised laws applicable to the offences enumerated, and that these laws would not, in all cases, be the same in both countries. The agreement to surrender to each other criminals of certain classes was based upon the fact of the persons being criminals by the laws of the country from which they came, provided the evidence of criminality, according to the laws of the place where the fugitive so charged should be found, would justify his apprehension and commitment for trial if the crime or offence had been there committed; (d) and in this case it was held that, as slavery was tolerated in the United States, and the apprehension of a fugitive slave was authorised by law, such slave could not lawfully resist apprehension in order to gain his freedom, though our law conferred it upon every man, and, consequently, that a slave, so resisting, might be guilty

(a) *Reg. v. Bennet H. Young*; the *St. Alban's Raid*, 470, per Smith, J.

(b) *Reg. v. Bennet H. Young*, 9 L. C. J., 44, per Badgley, J.

(c) *The St. Alban's Raid*, 469, per Smith, J.

(d) *Re Anderson*, 20, U. C. Q. B. 190, per Burns, J.

of murder, and not necessarily of manslaughter, on the ground that his resistance was lawful. (a)

So far as we in Canada are concerned, the Treaty and Statutes are to be construed according to our laws in regard to the offences comprised within their provisions. In other words, the offence must be one of those enumerated according to our law, and the notions we entertain as to the ingredients necessary to constitute it. (b)

But our law is not absolutely to govern as to the particular offence in all its ingredients, and in relation to whatever circumstances may have influenced the party in committing it. Before this rule could prevail, there should be a similarity between the law of the State from which the person has fled and that of our country, in all the features and attributes of the particular crime. To some extent it might be reasonable to hold that the law of the two countries should be found to correspond. For example, if it were the law of a State that every intentional killing by a slave of his master, however sudden, should be held to be murder, without regard to any circumstances of provocation, or of any necessity of self-defence against mortal or cruel injury, then a fugitive slave who, according to the evidence, could not be found guilty of murder without applying such a principle to the case, could not legally be surrendered by the Treaty. It cannot, however, be held that, because a man could not, in the nature of things, be killed in this country while he was pursuing a slave, because there are not, and by law cannot be, any slaves here, therefore a slave who has fled from a slave State into this country, cannot be given up to justice because he murdered a man in that State who was at the time attempting to arrest him,

(a) *Re Anderson*, 20 U. C. Q. B. 190, per *Burns*, J.

(b) *Re Trueman B. Smith*, 4 U. C. P. R. 215.



under the authority of the law, in order to take him before a Magistrate, with a view to his being sent back to his master.

Under such circumstances, reference should be had to the positive law of the slave State, to the conduct of the party pursuing and the party pursued, to the knowledge of the latter that the purpose for which it was desired to arrest him was not contrary to the law of the country, or to the fact (if it should be so) that there was no apparent necessity to inflict death in order to escape. (a)

There are several decisions in our own courts as to the particular offences covered by the Treaty. Among the earliest and most important of these is Anderson's case (b). In that case, A., being a slave in the State of Missouri, belonging to one M., had left his owner's house with the intention of escaping. Being about 30 miles from his home, he met with D., a planter, working in the field with his negroes, who told A. that as he had not a pass he could not allow him to proceed; but that he must remain until after dinner, when he, D., would go with him to the adjoining plantation, where A. had told him that he was going. As they were walking towards D.'s house, A. ran off, and D. ordered his slaves, four in number, to take him. During the pursuit, D., who had only a small stick in his hand, met A., and was about to take hold of him, when A. stabbed him with a knife, and as D. turned and fell, he stabbed him again. D. soon afterwards died of his wounds. By the law of Missouri, any person may apprehend a negro suspected of being a runaway slave, and take him before a justice of the peace. Any slave found more than 20 miles from his

(a) *Re Anderson*, 20, U. C. Q. B. 170-1, per *Robinson*, C. J.  
(b) 20 U. C. Q. B. 124.

home is declared a runaway, and a reward is given to whosoever shall apprehend and return him to his master. A. having made his escape to this country, was arrested here upon a charge of murder; and the justice before whom he appeared having committed him, he was brought up in the Court of Queen's Bench upon a *Habeas Corpus*, and the evidence returned upon a *certiorari*. It was contended that as A. acted only in defence of his liberty, and upon a desire to gain his freedom, there was no evidence upon which to found a charge of murder, if the alleged offence had been committed here, and that he could not be demanded by the Treaty:—Held that under the Treaty and our statute Con. Stat. Can., c. 89, the prisoner was liable to be surrendered.

In *Re Beebe*, (a) the Court held that burglary is not an offence within the meaning of the Treaty, or the statutes passed to give effect to the Treaty.

In another case, a prisoner was arrested in Ontario for having committed in the United States the crime of forgery, by forging, coining, counterfeiting, and making spurious silver coin, etc.:—Held that the offence as above charged does not constitute the crime of forgery within the meaning of the Treaty or Act, for it was not forgery according to our law. (b) In *ex parte E. S. Lamirande*, (c) the Court held that the making of false entries in the books of a bank does not constitute the crime of forgery according to the law of England or Canada, and the prisoner, therefore, was not liable to be extradited on the requisition of the French authorities under the Imp. Statute 6 & 7 Vic., c. 75.

In *Reg. v. Gould*, (d) *Hagarty, J.*, at page 162, says,

(a) 3 U. C. P. R. 273.

(b) *Re Trueman B. Smith*, 4 U. C. P. R. 215.

(c) 10 L. C. J. 280.

(d) 20 U. C. C. P. 154.

“The term ‘forgery,’ in the extradition treaty, means that which by universal acceptation it is understood to mean, namely, the making or altering a writing so as to make the writing or alteration purport to be the act of some other person which it is not.”

It seems piracy, as used in the Treaty, was intended to apply to piracy in its municipal acceptation, cognizable only by tribunals having jurisdiction either territorially or over the person of the offender. If, however, it signify piracy in its primary and general sense, as an offence against the law of nations, it can only come within the operation of the Treaty when a pirate, having gone into one or other of the countries, and so made himself amenable to its courts and after having been there legally charged with the offence, has fled or been subsequently found within the territory of the other (a).

When an act assumes an international character, and is sanctioned by the aggregate power and will of a nation claiming to exercise belligerent rights, all private jurisdiction over it, as regards individual responsibility, ceases, and it is beyond the reach of the Treaty or the Statutes. In such case, reference can only be had to the arbitrament of the sword. And an offence cannot be divested of its international character, by selecting from an act—referable for its approval or censure only to the law of nations—a portion of, or an incident in, such act, and then attempting to subject such portion or such incident to trial by a municipal tribunal, for the whole of the details and incidents which in the aggregate constitute a national or hostile act, must be taken together. (b) In accordance with these principles, it was

(a) *The Chesapeake case*, 44-5.

(b) *Reg. v. Bennet H. Young*; the *St. Alban's Raid*, 454, per Smith, J.

held that the St. Alban's Raid (the facts of which are given in the report), was a hostile expedition, authorized by a Government entitled to claim belligerent rights, and should be disposed of by international law, founded on the rights of belligerents, and not by a neutral judge. (a)

This principle was also recognized in Burley's case. (b) The counsel for the defence contended that the act charged was committed by the prisoner while engaged in an act of hostility duly authorised by the Confederate States against the United States; and no doubt, if this had been established, the Court would have discharged the prisoner. But it was held that, under the circumstances of the case, as shewn, as well on the part of the prosecution as of the defence, the accused, who took the property of a non-combatant citizen, by violence, from his person, was guilty of *robbery*, and liable to be surrendered under the Treaty. It was also very fully recognized in the most important case of "The Chesapeake" in New Brunswick. There evidence was produced to establish an authority from the Government of the Confederate States, as recognized belligerents, for the commission of the acts charged.

Where the crime comes within the Treaty, it is immaterial whether it is according to the laws of the United States, only a misdemeanor and not a felony; our concern is to deal with these foreign offences in our own country in like manner as if they had been committed here—to enforce the Treaty effectually and in good faith, and to leave all questions of municipal law between the foreign authorities and their prisoners to be dealt with and settled by their own system, with which, in that respect, we have nothing whatever to do. (c)

(a) *Reg. v. Bennet H. Young*; the *St. Alban's Raid* 454, per *Smith, J.*

(b) 1 U. C. L. J. N. S. 20 and 34.

(c) *Re R. B. Caldwell*, 6 C. L. J. N. S., 227, 5 U. C. P. R. 217.

When application is made to a Magistrate for a warrant of arrest under the Treaty, his first consideration should be, whether the alleged offence is within the terms of the Treaty. But for the Treaty and the Statutes, the proceedings by a Magistrate, in respect of a crime committed in the United States, by way of arresting or committing the accused to prison, would be *coram non judice*, and upon *Habeas Corpus* the prisoner would be entitled to his discharge. The whole power to deal with a crime in a foreign country is derived from the Treaty and the Statutes, and there is no jurisdiction or power to take any proceedings under the Treaty, except for one of the offences mentioned therein; (a) and if the Magistrate does not find by his warrant that one of these offences has been committed, the whole case fails, and no legal power exists to correct or supply the defect. (b)

In considering, therefore, the right to arrest and detain, it ought clearly to appear that the prisoner is charged with an offence within the Treaty. If doubtful whether it is one of those enumerated or not— if, for instance, it is not clear whether the offence alleged to have been committed amounts to murder or manslaughter, that interpretation should be adopted which is most in favour of the liberty of the accused; and as manslaughter is not mentioned in the Treaty, the party should not be arrested and detained. (c) Nor does the last Act 31 Vic., c. 94, give extended powers in this respect, or any authority to commit, except for the purposes specified therein; and if the evidence does not warrant this step, the accused must be discharged. (d)

The Magistrates to whom application may be made for

(a) *Re Anderson*, 11 U. C. C. P. 52, 3 per Draper, C. J.

(b) *Ib.* 68, per Hagarty, J.

(c) *Ib.* 62-3, per Richards, J.

(d) *Reg. v. Reno and Anderson*, 4 U. C. P. R. 295, per Draper, C. J.

the warrant of arrest are mentioned in the 31 Vic., c. 94, s. 1, as amended by the 33 Vic., c. 25. Any Judge of either of the Superior Courts has power to issue his warrant and examine witnesses, or take evidence with a view to commitment for the purposes of extradition; but the power is only to the Judges individually, and not to the Court, as such. (a) So a Recorder has equal jurisdiction with the Judges of the Superior Courts in this respect. (b)

It was held in the *Chesapeake* case, that the Magistrate must have jurisdiction, judicially as well as territorially, over the offence, and that if it were of such a character that he would have no jurisdiction over it when committed in this country, neither the Treaty nor the Statute authorized an inquiry for the purpose of committing the offender, when his offence arose in the United States. This case, however, was under the Imp. Stat. 6 & 7 Vic., c. 76, which only empowered any "Justice of the Peace or other persons" to act under the Treaty. The tendency of recent legislation has been to vest this power in the superior magistracy of the country; and if it is still held that they must have a judicial as well as territorial jurisdiction over the offence, the jurisdiction is nevertheless very much enlarged.

The following case shews the authority for appointing a Magistrate to act under the Treaty, the powers which the appointment confers, and also that they are not affected by the circumstance that another Magistrate has, after hearing evidence, etc., discharged the fugitive:—

The prisoners were arrested at Toronto, under a warrant issued by one M., on an information laid by B., charging them with robbery, committed with violence,

(a) *Re Anderson*, 11 U. C. C. P. 65, per *Richards*, J.

(b) *Re B. G. Burley*, 1 U. C. L. J. N. S. 50, per *John Wilson*, J.

in one of the United States of America, and stating the information to be laid before "the undersigned Police Magistrate in and for the County of the City of Toronto, amongst other Counties appointed under and by virtue of the Act of the Parliament of Canada, 28 Vic., c. 20, entitled," etc. The warrant of arrest described M. as Police Magistrate for all these Counties, naming them in full, and the warrant of commitment as Police Magistrate for the County of Essex, amongst other Counties appointed under and by virtue of the above Act (but no commission empowering him to act was produced on this application, which was for the prisoners' discharge under a writ of *Habeas Corpus*). Under this warrant, the prisoners were conveyed to S., in the County of Essex, and evidence was given there, before M., of the robbery in question, consisting of certain depositions taken in the United States, before a Justice of the Peace there, on which an original warrant of arrest was issued by him. These depositions had been taken, and warrant issued, after the arrest at Toronto. On this evidence, the prisoners were committed to custody, to await the warrant of the Governor-General for their extradition to the United States. The prisoners, it seemed, had been previously arrested at Toronto on the same charge, and been discharged by the local Police Magistrate, after a lengthened investigation had before him. It was held that this discharge did not prevent another duly qualified officer from entertaining the charge against them, on the same or on fresh materials, and that the failure of one Magistrate, from mistake or otherwise, to commit persons charged for extradition, cannot prevent the action of another: Held, also, that the 29 & 30 Vic., c. 51, s. 373, (now repealed and re-enacted by (Ont.) 32 Vic., c. 6, s. 11) only applied to any case *arising in any town or city in*

Ontario, and did not preclude M. from taking the information of B. and issuing his warrant in Toronto, where there was already a Police Magistrate; for that the words of the section merely excluded him from jurisdiction there in local cases, but did not apply to cases arising under the extradition laws.

It was further held, that the appointment of M. might well have been made under 28 Vic., c. 20, for any one or for all the Counties of Ontario, including Toronto, and his power made the same as a Police Magistrate in Cities, except as regarded purely municipal matters, and that this Act was continued by (Ont.) 31 Vic., c. 17, s. 4; but that as nothing was suggested in any way impugning the possession by M. of the authority to act, the ordinary rule must prevail, and the warrant be treated as executed by an officer possessing such authority. (a)

A warrant may be, in the first instance, issued in this country, and the proceedings under the Treaty and Statutes initiated here; (b) and it is not necessary that an original warrant should have been granted in the United States. The *charge* may be made within the jurisdiction of *either* of the high contracting parties, in case the evidence of criminality, "according to the laws of the place where the fugitive, or person *so charged*, should be found, would justify his apprehension and commitment for trial, if the crime or offence had *been there* committed. (c)

It is not a condition precedent to the jurisdiction of the magistrate that the charge should be first laid in the United States, or that a requisition should be first made by the Government of the United States upon the Canadian Government, or that the Governor-General of

(a) *Reg. v. Morton*, 19 U. C. C. P. 9.

(b) *Re Anderson*, 11 U. C. C. P. 53 per *Draper*, C. J.; *Reg. v. Morton*, 19 U. C. C. P. 19 per *Hagarty*, J.

(c) *Re R. B. Caldwell*, 6 C. L. J. N. S. 227, 5 U. C. P. R. 217.



Canada should first issue his warrant requiring magistrates to aid in the arrest of the fugitives. (a) The foregoing cases are directly contrary to the Chesapeake case on the above points. The latter, however, being under the Imp. Stat. 6 & 7 Vic., c. 76, which is different from the 31 Vic., c. 94, does not shake the authority of the others. In fact, Young's case directly overruled the Chesapeake on these points. In Young's case it was held that the Imp. Stat. 6 & 7 Vic., c. 76, not being in force in this country, (b) therefore the provision in this Statute that, before the arrest of any fugitive offender, a warrant shall issue under the hand and seal of the Governor-General, signifying that an application had been made by the United States for the delivery of such offender, and requiring all magistrates to govern themselves accordingly, does not apply here; and that without such warrant, and in virtue of our own legislation on the subject, a Judge of the Superior Court for Quebec has jurisdiction over the several classes of offences enumerated in the Treaty. (c) Our statute was intended expressly to render the warrant of the Governor unnecessary for the above purposes; and if the requisition of the United States were necessary before arresting a person who had committed a crime, he might escape entirely. The delay would be so great, that the prisoner could in the meantime fly beyond the reach of our laws, though there was clear and indisputable evidence of his guilt. (d) The magistrate need not consider in what part of the United States the offence was committed, so long as it appears to have been committed within the jurisdiction of their Government. These extradition offences do not fall within the estab-

(a) *Re B. G. Burley*, 1 U. C. L. J. N. S. 34; *Reg. v. Bennet H. Young*, 9 L. C. J. 29.

(b) *Ante* p. 26.

(c) 9 L. C. J. 29

(d) *Re B. G. Burley*, 1 U. C. L. J. N. S. 45, per *Richards, J.*

lished rule and practice that every offence against our law must be enquired of, tried, and determined within the County or place wherein it was committed. (a)

The Judge or Magistrate issuing the warrant for the apprehension of the offender, is the person before whom the evidence in support of the charge must afterwards be heard, and he must determine upon its sufficiency; (b) but his decision is not binding on the Governor, and the latter may, notwithstanding, order the prisoner's discharge: (c) for the magistrate must send or deliver to the Governor a copy of all testimony taken before him, that a warrant may issue upon the requisition of the United States for the surrender of the prisoner pursuant to the Treaty. (d) Nor is the opinion of the committing magistrate conclusive on the prisoner; for, if adverse to the latter, he may still apply to the Governor, whose decision may possibly be influenced by considerations which a court could not entertain. (e) And a *quære* is added to this case whether it was not the intention of the 31 Vic., c. 94, to transfer to the Governor exclusively the consideration of all the evidence, that he might determine whether the prisoner should be delivered up.

It may be observed here, that the surrender of persons for imputed crimes can only be made by the supreme executive authority of independent nations. (f) By the British North America Act, 1867, s. 132, the Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada, or of any Province thereof, as part of the British

(a) *Reg. v. Reno and Anderson*, 4 U. C. P. R. 292, per *Draper*, C. J.

(b) *The Chesapeake case*, 46; *Re Anderson*, 20 U. C. Q. B. 165-9, per *Robinson*, C. J.

(c) *Ib.* 189, per *Burns*, J.; *Reg. v. Reno and Anderson*, 4 U. C. P. R. 295, per *Draper*, C. J.

(d) *Re B. G. Burley*, 1 U. C. L. J. N. S. 45 per *Richards*, C. J.; *Re Anderson*, 20 U. C. Q. B. 165-189; see 31 Vic. c. 94, s. 1.

(e) *Reg. v. Reno and Anderson*, 4 U. C. P. R. 295, per *Draper*, C. J.

(f) *Reg. v. Bennet H. Young*; *the St. Alban's Raid*, 167, per *Smith*, J.

Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries. No doubt, the Ashburton Treaty is covered by this clause, and that under it the Governor-General has power to deal with extradition cases to the exclusion of the Lieutenant-Governors of the several Provinces.

The surrender, also, must be by the Governor-General, as representing the Government. (a) But, although he is thus the only authority in Canada for the extradition therefrom of fugitive criminals from the United States of America, yet his power to act at all is derived solely from the local law substituted for the Imperial act, by his Imperial Constituent, Her Majesty; and therefore his power is necessarily confined within the letter of the local law. Hence the Governor is powerless to act against such fugitives charged with the commission of any other of the formidable list of social offences not enumerated in the Treaty, because these are not contained within the local law. And he is still more completely without power against fugitives for political offences, not only because of their non-inclusion amongst the offences enumerated in the local and imperial laws, and in the Treaty stipulations, but because the right of territorial asylum for such fugitives is within the protection and safeguard of the Imperial authority, and may not be violated by the self-action of the administrator of the Colony. It is manifest, therefore, that the power of extradition and its exercise in Canada, resides in the Governor, as the representative of Her Majesty, and of the Imperial power as settled by local law, and not as the mere colonial executive. (b) It seems that the Courts may, to some extent, control or direct the action of the Executive; for

(a) *Reg. v. Tubbee*, 1 U. C. P. R. 98.

(b) *Reg. v. Bennet H. Young*, 9 L. C. J. 46 per *Badgley*, J.

when a party is committed under a magistrate's warrant, he may apply to any of the superior courts or judges for a *Habeas Corpus*, and the court in term, or the judges in vacation may determine whether the case be within the Treaty, and, if not, whether a legal power to surrender the prisoner is, nevertheless, reposed in the executive Government; and, if so, then whether a case was made out which entitled the Government to grant such surrender. (a) The Governor is not authorized to surrender the prisoner until the expiration of seven days after his commitment. (b) This is a new provision, and was probably inserted in the statute to give the prisoner an opportunity of having the magistrate's decision reviewed on *Habeas Corpus* and *certiorari*.

The fact that the person is charged with piracy committed in the foreign country ought not to prevent the Governor from surrendering him on the charge made and proved in this country. But if the charge in this country is robbery, and the requisition on behalf of the Government of the foreign country be for his extradition for the crime of piracy, he could not be surrendered under a warrant of commitment for robbery. And if his surrender is demanded for any other offence than the one for which he has been committed, it must be refused (c)

Looking at the statute, we find that the commitment of the prisoner is to be made upon such evidence as, according to the laws of the Province in which he has been apprehended, would justify his apprehension and committal for trial, if the crime of which he is accused had been committed therein. This seems to impose on the magistrate the same duties as devolve upon justices of the

(a) *Reg. v. Tubbee*, 1 U. C. P. R. 98.

(b) 31 *Via. c.* 94, s. 3.

(c) *Re B. G. Burley*, 1 U. C. L. J. N. S. 45-6, per *Richards*, C. J.

peace, on charges of indictable offences committed within our own jurisdiction; and when he would commit for trial under a similar state of facts arising in this country, he is bound to commit for trial under the Treaty, and our statutes passed to carry it out. (a) The authority of the magistrate does not extend beyond the enquiry indicated by the statute; (b) but he is bound to see that the commitment for extradition is warranted by the statute, and that the offence is sustained by evidence which in our own courts would *prima facie* establish the crime charged. (c) When such *prima facie* case is made out, and the evidence in defence is not clear and conclusive, a jury is the only constitutional tribunal which can determine whether evidence offered to displace the impression which the *prima facie* case is calculated to make, does or does not satisfactorily displace it; and all questions of intent, or of fact or inference, should be submitted to them. (d) The magistrate, therefore, should not go beyond a bare enquiry as to the *prima facie* criminality of the accused, and should not enquire into matters of defence which do not affect such criminality; such, for instance, as whether the prosecution of the offender is barred by a statute of limitations in the foreign country, or whether there is a probability of the ultimate conviction of the prisoner therein. (e) Conflicting or unsatisfactory evidence in answer to a strong *prima facie* case, though perhaps properly receivable, would not justify the magistrate in discharging the prisoner: (f) for it is to be observed that he cannot *try* the case here, nor weigh conflicting evidence, nor assume the functions of a

(a) *Re B. G. Burley*, 1 U. C. L. J. N. S. 48, per *Richards*, C. J.

(b) *Reg. v. Reno and Anderson*, 4 U. C. P. R. 281.

(c) *Reg. v. Morton*, 19, U. C. C. P. 25, per *Wilson*, J.

(d) *Reg. v. Gould* 20 U. C. C. P. 159, per *Gwynne*, J.; the *Chesapeake* case 48.

(e) *Ex parte G. H. Martin*, 4 C. L. J. N. S. 200, per *Morrison*, J.

(f) *Reg. v. Reno and Anderson*, 4 U. C. P. R. 281.

jury by deciding as to the credibility of witnesses. (a) In *Burley's* case, the accused, on his examination before the magistrate, admitted the acts charged, which *prima facie* amounted to robbery, and alleged, by way of defence, matter of excuse which was of an equivocal character, and bore different interpretations, and the court held that the magistrate could not try the case, nor act on the explanatory evidence by way of defence; but the *prima facie* evidence being sufficient to justify the committal of the prisoner, the facts necessary to rebut the *prima facie* case could only be determined by the courts of the United States. If there is not sufficient evidence of criminality, the magistrate ought not to commit; if there is, he ought, notwithstanding the evidence is sufficient, if true, to rebut an *alibi*. If he discharges because the evidence *pro* and *con* is equally strong, and he cannot determine which side is telling the truth, he is in error, because, in either of these cases, if he pursued any other course, he would, for many purposes, be assuming the functions of a jury, and, on a preliminary investigation, trying the whole merits of the case, though the enquiry was only instituted to ascertain whether the evidence of criminality would justify the apprehension and committal for trial of the person accused. (b)

If the facts proved admit of different interpretations as to the *intent* with which the prisoner acted, this is no ground for refusing to commit for extradition, because the question of intent is for the jury on the trial. (c) Thus, if the charge is of assault with intent to commit murder, it is no objection that the facts proved are as

(a) *Reg. v. Reno and Anderson*, 4 U. C. P. R. 281; *Re Burley*, 1 U. C. L. J. N. S. 34; *Reg. v. Bennet H. Young*; the *St. Alban's Raid*, 449, per *Smith, J.*; *ex parte G. H. Martin*, 4 C. L. J. N. S. 200 per *Morrison, J.*

(b) *Reg. v. Reno and Anderson*, 4 U. C. P. R. 299, per *Draper, C. J.*; *Re B. G. Burley*, 1 U. C. L. J. N. S. 46, per *Richards, C. J.*

(c) *The Chesapeake case*, 48.

much evidence of other felonious intents as of the intent to murder. (a) And if the evidence presents several views, on any one of which there may be a conviction if adopted by the jury, the court is not called upon to determine which of the views is best supported, but may commit the prisoner for surrender. (b)

The magistrate should remember that the citizens of a foreign country are entitled to precisely the same measure of justice as our own people. (c) But he should not hesitate in committing the prisoner for extradition from any fear that he will not be fairly dealt with in the United States; and, even if he is satisfied that the prisoner will not be tried fairly and without prejudice in the foreign country, he cannot refuse to give effect to the statute by acting on such an assumption. (d) But he must assume that courts in other countries will be governed by the same general principles of justice which prevail in our own courts, and that the prisoner will have a fair trial after his surrender. (e) We are not to overlook or forget for an instant that we are dealing with a highly civilized people, most tenacious of their liberty, whose laws are similar to our own, but administered with more of the common law technicality than we have thought it expedient to retain, by which many avenues are left open for criminals to escape which we have closed; (f) so that a prisoner is more likely to be acquitted in the United States than here.

An information stating that the prisoner was apprehended "on suspicion of felony," was held too general,

(a) *Reg. v. Reno and Anderson*, 4 U. C. P. R., 296, per *Draper*, C. J.

(b) *Reg. v. Gould*, 20 U. C. C. P. 154.

(c) *Re Kermott*, 1 Chr. Reps. 256, per *Sullivan*, J.

(d) *Re Anderson*, 20 U. C. Q. B. 173, per *Robinson*, C. J.

(e) *Reg. v. Reno and Anderson*, 4 U. C. P. R. 299, per *Draper*, C. J.; *Re B. G. Burley*, 1 U. C. L. J. N. S. 48, per *Richards*, C. J.

(f) *Reg. v. Morton*, 19 U. C. C. P. 25, per *Wilson*, J.

as not containing a charge of any specific offence. (a) The information in this case was considered as for an ordinary offence, committed within our own jurisdiction. But it is no objection to the information and complaint on which the Magistrate issues his warrant for the arrest of the party, in the first instance, that the complainant was not an eye-witness of the facts to which he deposes, or that they are stated on information and belief; at least, the offender may be lawfully brought before a Justice, and detained a reasonable time, until the proper evidence can be produced. (b)

In *Re Kermott*, (c) a question was raised, whether a committing Magistrate could detain a prisoner on evidence amounting only to a ground of suspicion, for the purpose of other evidence being imported into the case, so as to bring it within the Treaty; but, per Sullivan, J. (d), neither the Treaty nor the Statutes contemplate the surrender of an accused person upon mere suspicion. However the law may be on this point, there is no doubt of the Magistrate's power to detain the prisoner when the evidence is clear and satisfactory as to his guilt, and this even although he has been arrested upon a void warrant. Thus, where a prisoner was committed for extradition, and a *Habeas Corpus* and *Certiorari* for his discharge obtained, it was held that the material question was, being in custody, whether a sufficient case was made out to justify his commitment for the crime charged; that it was immaterial that the original information, warrant, etc., were irregular and defective, if, on the hearing, sufficient appeared to justify the commitment; that it would be absurd to discharge the prisoner because the

(a) *Reg. v. Bennet H. Young*; the *St. Alban's Raid*.

(b) *Re Anderson*, 20 U. C. Q. B. 151, per *Robinson*, C. J.; and see *Reg. v. Rao and Anderson*, 4 U. C. P. R. 287.

(c) 1 *Chr. Rep.* 253.

(d) *Id.* 256.



warrant might be void, when the evidence, on the hearing, would justify re-arresting him the next moment, and that the commitment must therefore be upheld. (a)

In *Re Anderson*, (b) it was held that, when a person is brought before the Court upon a writ of *Habeas Corpus*, and the warrant of commitment upon which he is detained appears on its face to be defective, the Court before whom the prisoner is brought has no authority to remand him, and that such power is only possessed by the Court in virtue of its inherent jurisdiction at common law, and does not extend to proceedings under the Extradition Treaty and Statutes. But it has been held in Quebec that a Judge of Sessions, when a prisoner is brought before him on the original warrant of arrest, has power to remand under the Treaty and Statutes; and when the remand appointed no day for the further examination of the prisoner, and an application was made for a *Habeas Corpus* (before the eight days after the remand had expired), (c) on this ground, and on the ground that the Judge had no power to remand, the writ was refused, the Court holding that the power to remand was essential to the performance of the Magistrate's duties, and that the irregularity in not fixing the day was unimportant. (d)

We next proceed to consider the evidence by which the charge before the Magistrate is to be sustained.

The provision in the Statute as to the evidence of criminality being sufficient to justify the apprehension and committal for trial, if the offence had been committed here, merely furnishes a test as to the kind of evidence required. (e) So far as regards the means of proof, there can be no doubt that it is our law which must

(a) *Ex parte G. H. Martin*, 4 C. L. J. N. S. 198.

(b) 11 U. C. C. P. 1.

(c) See 32 & 33 Vic., c. 30, s. 41.

(d) *Reg. v. Bennet H. Young*; the *St. Alban's Raid*, 15.

(e) *Re Warner*, 1 U. C. L. J. N. S. 18, per *Hagarty*, J.

govern, according to the provision in the Statute. If, for instance, the law of the States, or any of them, should admit a confession extorted from a party by violence or threats, to be used against him on a charge of an offence coming within the provisions of the Treaty, such evidence could not be admitted here. (a)

The Judge, or other person acting, may proceed upon original *viva voce* testimony, in like manner as "if the crime had been committed in this Province." He may, however, also receive copies of the depositions on which the original warrant was issued in the United States, in evidence of the criminality of the accused. (b) But as the 31 Vic., c. 94, s. 3, is an enabling Act, there is no obligation on the part of the prosecutor to produce such depositions. (c) In construing and applying the third section of the above Act, which renders copies of the depositions on which the original warrant was granted in the United States admissible here, we must look at the spirit of the provision, not the mere letter, and in the language of our Interpretation Act, 31 Vic., c. 1, thirty-ninthly, p. 64, we must give it such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act, and of such provision or enactment, according to their true intent, meaning, and spirit.

What the section intended was, that any depositions made in the United States, before proper authority, and upon which a warrant issued for the arrest of the accused, should be received as evidence of his criminality, on the hearing before the Magistrate investigating the charge. The main object contemplated by the enactment was to

(a) *Re Anderson*, 20 U. C. Q. B. 169, per *Robinson*, C. J.

(b) *Re B. B. Caldwell*, 6 C. L. J. N. S. 227, 5 U. C. P. R. 217, per *A. Wilson*, J.

(c) *Ib.* 227, per *A. Wilson*, J.

sanction the use of depositions, and to avoid the necessity of bringing the deponents here; and the referring to or connecting the depositions with the warrant in this section was for the purpose of ensuring that they should be such depositions as would be taken before competent authority, and in relation to the particular crime and the offence specified in the foreign warrant. (a)

In this case, it was held that certified copies of depositions, on which the warrant issued in the United States, after proceedings had been initiated in Canada, and after the arrest in Canada, were admissible in evidence before the Magistrate. (b) But under the third section of this Statute, (c) the depositions that may be received as evidence of the criminality of the prisoner must be those upon which the original warrant was granted in the United States, certified under the hand of the person issuing it, and not depositions taken subsequently to the issue of the warrant, and not in any way connected therewith. (d) And as the Statute permits depositions taken in a foreign court to be used in lieu of oral testimony, when the case depends wholly upon such depositions, we must be strict in seeing that they are depositions coming clearly within the meaning and provisions of the section. (e)

These depositions may be used when the warrant for arrest actually issues in the United States. (f) An affidavit sworn before a Justice of the Peace in the United States, not being a copy of any original deposition, properly certified, is not admissible as evidence, nor is the objection cured by the consent of the prisoner's counsel. (g) The

(a) *Ex parte G. H. Martin*, 4 C. L. J. N. S. 200, per *Morrison*, J.

(b) *Ib.* 198; see also *Reg. v. Morton*, 19 U. C. C. P. 9.

(c) 31 Vic., c. 94.

(d) *Reg. v. Robinson*, 6 C. L. J. N. S. 98, 5 U. C. P. R. 189.

(e) *Ib.* 99 per *Morrison*, J.

(f) *Reg. v. Morton*, 19 U. C. C. P. 18, per *Hagarty*, J.

(g) *Re Anderson*, 20 U. C. Q. B. 183, per *McLean*, J.

evidence of a professional gentleman as to the law of the United States is properly admissible before the Magistrate. (a)

In the *St. Alban's Raid* case, the examination of the witnesses for the prosecution was conducted in the manner prescribed by the 32 & 33 Vic., c. 30, s. 29 *et seq.*, as to offences committed here. The prisoner was allowed to cross-examine the witnesses, and the depositions certified that he had the opportunity of doing so. The voluntary statement of the prisoner was taken, as by s. 31 of this Statute, at the request of the Crown counsel. The Judge, however, declined to express an opinion as to its legality. (b)

The sufficiency of the evidence of criminality to justify the apprehension and committal for trial of the person accused is to be determined by the Judge or Magistrate, upon his view of the transaction, as described in the testimony, taken in connection with the law of the foreign State where it occurred, as regards the offence in question, and also with reference to the law which governs our own Courts in regard to the sufficiency of evidence—that is, its sufficiency in point of legal character, and its adequacy to support the charge of the offence against the law of the foreign country. (c)

The functions of the Magistrate are not simply ministerial in this respect. He must hear the evidence, and exercise a proper judicial discretion as to whether the facts establish a case for the rendition of the prisoner. (d) It is very important to determine the extent to which evidence in defence may be properly received before the Magistrate on behalf of the prisoner. It is submitted

(a) *Ib.* 172, per *Robinson*, C. J.

(b) See, also, the *Chesapeake* case, on these points.

(c) *Re Anderson*, 20 U. C. Q. B. 124, *Robinson*, C. J.

(d) *Reg. v. Bennet H. Young*; the *St. Alban's Raid*, 197, per *Smith*, J.; the *Chesapeake* case, 46.

there is ample authority for the position that such evidence is admissible to establish that the offence does not come within the Treaty. (a) But whether it is admissible to the full extent, and in the same manner, as on preliminary investigations before Magistrates of offences arising here remains as yet to be decided.

In Young's case, Judge Coursol granted a delay of thirty days to the prisoners, to enable them to prepare evidence in defence, to shew that the acts with which they were charged were committed as belligerents, under the authority of the Government of the Confederate States. He declared his opinion that, in admitting such evidence, he would not be assuming the functions of the American Courts, or virtually trying the accused, as the Statute required the Magistrate to be perfectly satisfied of the criminality of the act, according to our law. (b) When the case came before Mr. Justice Smith, he granted thirty days' further delay, for a similar purpose. The Justice considered that, although he could not try the prisoners, yet he was bound to see whether their crime came within the Treaty, and that, if they shewed they were belligerents, then possibly there might be an end of the matter. He said, "I admit evidence not, technically speaking, for the defence, because there is no such thing as a trial before an examining magistrate; but evidence as a coroner might admit it, who must receive whatever is calculated to have a bearing on the inquiry to fully develop the facts respecting the offence charged." And he held that the evidence was clearly admissible. (c) Although the Burley case turned principally on the power of the Magistrate to try

(a) *Reg. v. Bennet H. Young; the St. Alban's Raid; the Chesapeake case; Re Burley*, 1 U. C. L. J. N. S. 34.

(b) *Ib.* 115.

(c) *Ib.* 449.

the prisoner, it is certainly not inconsistent with the right to adduce for the defence such evidence as was given in Young's case. In the former, it was assumed by counsel, and by the court, that if it were clearly established the prisoner acted only as a belligerent, duly commissioned by the Government of the Confederate States, he could not be committed for extradition. The evidence was offered, to shew this authority from the Confederate Government, but it was not sufficient to establish it conclusively. The acts charged were admitted, but their criminality was denied. The Court declared that, under the circumstances, a Magistrate could not do otherwise than commit for trial by a jury, if it were an offence arising within our own jurisdiction, and they in effect said:—"A *prima facie* case is made out against the prisoners, and the evidence in defence does not clearly disprove it. Granting that his individual responsibility would cease if the acts were of a belligerent character; on this evidence, we cannot determine whether they are or are not endued with this quality. The prisoners' acts are equivocal, and may or may not be acts of lawful war. His intent, the good faith of the enterprise, and the credibility of witnesses, are important, and properly ascertainable by a jury. We have no power to try the case, and thus assume the functions of a jury in the United States."

The difference between this and Young's case would seem to be, that in the latter the evidence was such as to satisfy the *Magistrate*, without the intervention of a jury, that the prisoner had the authority he set up, and was therefore entitled to be exonerated from individual liability. The actual *decision* in Burley's case was as to the power of the Magistrate to try the accused. The point as to the admissibility of the evidence was fully

argued, but none of the Judges, except *Richards*, C. J., expressed an opinion as to its admissibility. The latter was clearly of opinion that the evidence was admissible, in the same manner as on the investigation of an ordinary offence arising in our own country. The opinion of this learned Judge is certainly entitled to very great weight. In the Chesapeake case, evidence of a precisely similar character was offered for the same purpose as in the other two, and received without objection. And in this case it was also held that the evidence was not such as the Magistrate could adjudicate upon, but called for the intervention of a jury in the tribunals of the United States.

In *Re R. B. Caldwell*, (a) the court held that the evidence of an accomplice was sufficient to establish the charge for the purpose of extradition, and that magistrates holding preliminary examinations might undoubtedly act on the evidence of an accomplice, as the matter in investigation is merely whether the accused shall be put upon his trial or not; and when all questions as to how far the accomplice is entitled to credit will be duly considered at the proper time. *Semble* also, the evidence of a slave may be received. (b)

If the prisoner is committed for surrender on insufficient evidence, a judge in chambers will, on writs of *Habeas Corpus* and *certiorari*, order his discharge. (c) The following case is important in regard to the sufficiency of the evidence.

The express car of a railway train, on one of the roads in the United States of America, was broken into, and plundered by five or more men, two or three of whom fired at the conductor, who was endeavouring to stop

(a) 6 C. L. J. N. S. 227, 5 U. C. P. R. 217.

(b) *Re Anderson*, 20 U. C. Q. B. 182, per *McLean*, J.

(c) *Re Kermott*, 1 Chr. Rep. 253.

them as they were moving off with the engine. The conductor was at the time about eight feet from the person who fired the first shot, and the ball passed through his coat. This person was a brother of Reno, one of the prisoners apprehended. The express messenger swore to the identity of the prisoners, and as to the identity of the person who fired the first shot. The prisoners were arrested in Canada, at the instance of the Express Company, and demanded for extradition by the United States authorities. The prisoners offered evidence on their examination to prove an *alibi*. *Draper*, C. J. (in Chambers) held that, under the circumstances of this case, there was sufficient *prima facie* evidence of the criminality of the prisoners to warrant a refusal to discharge them, and that there was evidence to go to a jury to lead to the conclusion that the intent of the prisoners was, at the time of shooting, to commit murder. (a)

In *Re Anderson*, (b) (although the objection to the jurisdiction was expressly waived by the counsel for the Crown) the Court entertained some doubt whether it was competent for them to interfere in the case of an offender coming clearly within the terms of the Treaty, after the Judge or Justice who has heard the evidence has determined that, in his opinion, it sustains the charge, and has transmitted to the Governor a copy of the testimony on which he has decided, and also committed the prisoner to the proper gaol, under the first section of the Act. The Court considered that there could be nothing clearer than the authority of our superior courts of law to exercise the same control over inferior criminal courts, and over magistrates acting in the administration of criminal law, as is exercised in

(a) *Reg. v. Reno and Anderson*, 4 U. C. P. R. 281.

(b) 20 U. C. Q. B. 174.



England, in like cases, by the Court of Queen's Bench. But as this authority is either given in particular cases by statute, or in other cases is exercised upon principles of the common law, in matters occurring in the ordinary administration of criminal justice, and arising within the ordinary reach of our laws, and the authority they were called upon to exercise in this case, sprung from no such sources, but rested wholly upon the provisions of a Treaty between Great Britain and a foreign Government, and of our Statute passed in conformity with that Treaty. The application also did not come within the section of the Act by which authority is given to the Judges of the superior court to discharge on *Habeas Corpus* a prisoner who has been committed for surrender, pursuant to the provisions of the Treaty and the Act, and has remained two months in gaol without such surrender.

But as this authority had been assumed to exist in two other cases, (a) and the Court felt there was a strong argument for the necessity of a controlling power in the Superior Courts, without which the Governor must be left with the responsibility of exercising, with the assistance of his legal advisers, whatever discretion he may find reposed in him by the Statute; and as there was no decision to the contrary, the Court, without actually deciding the point, assumed to exercise the power of determining whether the commitment of the prisoner was warranted by the evidence, with the view, of course, of granting his discharge, if they came to the conclusion he was improperly in custody.

In *Re Warner*, (b) *Hagarty*, C. J. declared that he shared the grave doubts expressed by the Court in *Anderson's* case as to the right of the Judges to interfere

(a) *Kermott's case*, 1 Chr. Rep. 253, and *Tubbee's case*, 1 U. C. P. R. 98.

(b) 1 U. C. L. J. N. S. 18.

by *Habeas Corpus*, except in the case specially provided for by the 5th section of the 31 Vic., c. 94. In the Chesapeake case, Mr. Justice Ritchie stated that the duty of determining on the sufficiency of the evidence was cast on the committing Magistrate—that he was invested with a judicial discretion in this respect which a Judge of the Supreme Court would not review on *Habeas Corpus*, adding, however, that if it was manifestly apparent on the evidence that no offence had been committed, or that the party was unquestionably innocent, the case would be very different.

The Act gives no power to obtain a writ of *Habeas Corpus*, except in cases under the 5th section, where the prisoner has remained in custody more than two months, without a requisition having been made. (a) The effect of the decision in the Chesapeake case is, that the right to a *Habeas Corpus* exists in extradition cases as well as others. In this case, an order was issued under the Act of Assembly, 19 Vic., c. 42. This Act gave the Judge like powers, upon an order issued under it, as in a proceeding by *Habeas Corpus*. Mr. Justice Ritchie held that not only was the order warranted, that the liberty of the subject might be preserved, but that he had power to review the proceedings before the Magistrate; and if there was no ground for them, or the Magistrate had fallen into any error, either in form or substance, and the parties appeared to be illegally imprisoned, to discharge them, but only when it was manifestly apparent on the evidence that no offence had been committed. The persons charged in this case, however, were inhabitants of New Brunswick, and British subjects. The Chesapeake case may, perhaps, be regarded as a *decision* in favor of the power of the Courts to review the Magistrate's find-

(a) *Re Anderson*, 20 U. C. Q. B. 189, per *Burns*, J.

ing as to the sufficiency of the evidence. It is, however, expressly limited to the case of the latter clearly exceeding his powers.

The weight of judicial authority seems to establish that the Magistrate's decision is reviewable by the Court. (a) The reasoning of Chief-Justice Richards, in *Re B. G. Burley*, (b) seems to be very forcible and conclusive. He says, "I think the right of the Court to review the decision of the Magistrate as to the sufficiency of the evidence to justify the committal of the prisoner is sustained by general principles of law, as well as by authority, and it is one which it is not desirable should be taken away. The sending of any man out of the country, under a constitutional Government, is a grave exercise of power, and ought not to be permitted, unless the right to do so is established in the clearest manner; and when this right extends to delivering over any of the Queen's subjects to a foreign power, as I am satisfied it does under our Statute, it is not going an unreasonable length to assert that the subject has the right to have it placed beyond reasonable doubt that the evidence given to sustain the charge is sufficient, in the judgment of the superior tribunals of the country, to warrant such proceedings being legally taken against him."

In *Reg. v. Reno and Anderson*, (c) it was declared that the Court, or a Judge, on *Habeas Corpus*, would, where the evidence before the Magistrate is conflicting, determine on the legal sufficiency of the commitment, and review the Magistrate's decision as to their being sufficient evidence of criminality.

Assuming that this power of revision exists, and that

(a) See *Re Anderson*, 20 U. C. Q. B. 189, per Burns, J.; *Reg. v. Tubbee*, 1 U. C. P. R. 102, per Macaulay, C. J.; *Re Kermott*, 1 Chr. Rep. 254, per Sullivan, J.

(b) 1 U. C. L. J. 46.

(c) 4 U. C. P. R. 281.

the evidence, etc., is brought up on *Habeas Corpus* and *Certiorari*, the matter is to be disposed of on the principle—taking the evidence laid before the Judge below, was there enough in the words of the Act “to justify the apprehension and committal for trial of the person accused, if the crime of which he is accused had been committed in this country.” (a)

The Court above must be fully satisfied there is no legal ground on which such decision can be supported before it is reversed, (b) and it would seem that if in one view of the evidence the Court find the decision sustainable, they ought not to interfere and reverse it. (c) Where the prisoner was brought before a Judge in general sessions, on the original warrant of arrest, and remanded before final commitment, the Court doubted their power to interfere by *Habeas Corpus* until final commitment. (d)

The following case bears on the question of return to the writ of *Habeas Corpus*:—

Where, after the prisoners were committed by a Justice for extradition, a writ of *Habeas Corpus*, directed to a gaoler, was sent to the Clerk of the Crown, with a return stating that he held the prisoners under a warrant of committal annexed, but was unable to produce them for want of means to pay their conveyance. This return having been marked by the Clerk, “received and filed, 26th September, 1868,” and signed by him, a Judge in Chambers made an order allowing these papers to be withdrawn, for the purpose of having another return made. The prisoners were afterwards produced, with the writ to which the foregoing return was annexed, and

(a) *Reg. v. Gould*, 20 U. C. C. P. 160

(b) *Ib.* 161, per *Hagarty*, J.

(c) *Ib.*

(d) *Reg. v. Bennet H. Young; the St. Alban's Raid*, 15.

another, stating that the prisoners were held under the warrant already spoken of, and a subsequent warrant by which an alleged defect in the first was intended to be cured. It was held that the first return was, in fact, no return, merely alleging matters of excuse for not making a return, and that, when a writ of *Habeas Corpus* is returnable before a Judge in Chambers, the return cannot be filed until it has been read before the Judge, and that the second return was the only one in this case, and, it having been openly read, was duly filed. (a) The return might have been amended, if necessary. (b)

The commitment authorised by the 31 Vic., c. 94, is peculiar. It is not a commitment for safe custody, in order that the party may be afterwards brought to trial within our jurisdiction. But it is a commitment, for *safe custody*, only until the Governor, upon a requisition made by the United States, shall, by his warrant, order the prisoner committed to be delivered to the person authorized by the United States to receive him, to be tried for the crime charged, or until the Governor order the discharge of the prisoners, which he has power to do, notwithstanding the decision of the Magistrate that the evidence is sufficient to warrant his surrender. (c)

The warrant of commitment should follow the terms of the Statute, and should use the technical term "murder" (or as the case may be) in describing the offence, for although in ordinary cases, where the crime under investigation has been committed in our own country, the technical precision and accuracy necessary in an indictment is not required in a warrant, yet neither this rule, nor the reason for it, apply to extradition cases. In the latter, there is only a special statutory jurisdiction con-

(a) *Reg. v. Reno and Anderson*, 4 U. C. P. R. 281.

(b) *Ib.* 291, per *Draper*, C. J.

(c) *Reg. v. Reno and Anderson*, 4 U. C. P. R. 295, per *Draper*, C. J.

ferred on the Magistrate, and, therefore, the warrant in the execution of the statutory power, thus limited, should adhere to the terms of the Statute, in order that it may appear clearly that the offence is one of those to which the Treaty and the Statutes directly apply. (a)

In *Anderson's* case, when before the Court of Common Pleas, it was held that a warrant of commitment which used the words "did wilfully, maliciously, and feloniously stab and kill," and omitted the word "murder," and "with malice aforethought," and concluded by instructing the gaoler to "there safely keep him (the prisoner) until he shall be thence delivered by due course of law," instead of the words of the Act, directing the prisoner to remain in gaol until his surrender, upon the requisition of the proper authority, or until he should be discharged according to law, did not come within the provisions of the Treaty or Statute, and was consequently defective. (b)

If the warrant has not the proper statutory conclusion, all that appears on its face is, that the prisoner remains in custody for an offence alleged to have been committed by him in a country over which our Courts have no jurisdiction, and without any explanation of the authority for such commitment, or of the object of it. (c) In ordinary cases, where the offence is against the Queen's peace, and where the Court acts in virtue of its inherent jurisdiction as a Court over the offence, if the warrant of commitment appears to be defective, but the depositions shew that a felony has been committed, the Court will look at the depositions, and remand the prisoner, in order that the defect may be corrected. But in extradition

(a) *Re Anderson*, 20 U. C. Q. B. 162, per *Robinson*, C. J.; 11 U. C. C. P. 53-54; the *Chesapeake* case. 41.

(b) 11 U. C. C. P. 1; see also the *Chesapeake* Case, 50.

(c) *Re Anderson*, 20 U. C. Q. B. 163, per *Robinson*, C. J.

cases, as the authority of the Court is derived wholly from the Treaty and the Statutes, and by the latter the duty of deciding on the sufficiency of the evidence is cast on the committing Magistrate, (a) they cannot look at the depositions, to ascertain whether the detention is warranted; and as they cannot remand the prisoner (b) if the warrant of commitment does not show a sufficient cause for the detention of the latter, he must be discharged. (c)

A warrant of commitment, which does not shew that the Magistrate deemed the evidence sufficient, according to the laws of the Province in which he has been apprehended, to justify the apprehension and committal for trial of the person accused, if the crime of which he is so accused had been committed therein, is bad. (d) The warrant must shew that the offence was committed within the jurisdiction of the United States. (e) But it need not set out the evidence taken before the committing Magistrate, nor shew any previous charge made in the foreign country, or requisition from the Government of that country, or warrant from the Governor-General of Canada, authorizing and requiring the Magistrate to act. (f) The adjudication of the committing Magistrate as to the sufficiency of the evidence for committal may be stated, by way of recital, in the warrant. (g)

A warrant of commitment, which directed the gaoler to receive the body of W. H., "and him safely keep for examination," was held defective in not mentioning the day, or limiting the time during which the prisoner

(a) *Ante p.*

(b) *Ante p.*

(c) *Re Anderson*, 11 U. C. C. P. 1 et seq.

(d) *The Chesapeake case*, 51; *Re Anderson*, 11 U. C. C. P. 64, per *Richards*, C. J.

(e) *The Chesapeake case*, 4-45.

(f) *Re Bennet G. Burley*, 1 U. C. L. J. N. S. 34.

(g) *Ib.*

was to be confined. (a) But in this case the warrant was considered as for an offence committed here. It was held, in one case, that the words in an information and warrant of commitment "did feloniously shoot at with intent, and in so doing, feloniously, wilfully, and of malice aforethought to kill and murder," involved "an assault with intent to commit murder," within the language of the last Act, 31 Vic., c. 94, and, therefore, they were not bad on that ground, though it would have been more prudent to have followed the precise description of the offence given by the Statute. (b) It is not indispensable that the authority of the Magistrate should be shewn on the face of the warrant of commitment; and where the crime has been committed in a foreign country, and the committing Magistrate has jurisdiction in every County in Ontario, the warrant is not bad though dated at Toronto, the county mentioned in the margin being York, but directed to the constables, etc. of the county of Essex, and being signed by the Police Magistrate, as such, for the county of Essex. (c)

In *Re Warner*, (d) the Court held that it is in the power of a Magistrate, acting under the Treaty and Statutes, after issue of a writ of *Habeas Corpus*, but before its return, though after an informal return, to deliver to the gaoler a second or amended warrant, which, if returned in obedience to the writ, must be looked at by the Court, or a Judge, before whom the prisoner is brought; and per *Hagarty*, J. (e) although a Magistrate, after his first warrant, transmitted copies of the testimony to the Governor, or even after committing the prisoner in the

(a) *Reg. v. Bennet H. Young; the St. Alban's Raid*, 5.

(b) *Reg. v. Reno and Anderson*, 4 U. C. P. R. 281.

(c) *Ib.*

(d) 1 U. C. L. J. N. S. 16.

(e) *Ib.* 17.



first instance, he is not precluded from issuing a second warrant, in proper form, against the prisoner.

If the prisoner is discharged on the hearing of the warrant of arrest, there can be no bail required as a condition of such discharge. (a)

A prisoner charged with forgery in Canada, having been arrested in, and surrendered by, the Government of the United States, under the Treaty, upon application for bail, on the ground that there was no evidence of the *corpus delicti* :—*Held* that the depositions taken here, expressly charging the prisoner with forgery, followed by an application for the prisoner's surrender, and his surrender accordingly, taken in connection with the fact that the evidence and proofs on which he was committed for surrender in the States must be held to be such as, under the Treaty, to justify it, according to the laws there, were sufficient evidence. (b)

The warrant of the Governor-General, requiring the extradition of a prisoner from the United States for forgery, is no proof that he was charged with or extradited for that crime. (c)

In *Reg. v. Paxton* (d) the question was raised, but not decided, whether a party extradited from the United States for forgery was liable here to be tried for any other offence than the one for which he was surrendered.

The provisions of the Treaty for the payment of the expenses of the apprehension and delivery of the fugitive, by the party making the requisition, can be literally carried out by calling on the United States Government to pay such expenses when they make the requisition and receive the fugitive. By mak-

(a) *Reg. v. Reno and Anderson*, 4 U. C. P. R. 295, per *Draper*, C. J.

(b) *Reg. v. Vanaerman*, 4 U. C. C. P. 288.

(c) *Reg. v. Paxton*, 10 L. C. J. 212.

(d) *Supra*.

ing the requisition they assume the responsibility of paying the expenses of apprehending as well as delivering him. (a)

Only one case has arisen in this country under the Treaty between Great Britain and France, ratified in 1843. In this case it was held that, under the Imp. Stat. 6 & 7 Vic., c. 75, passed to give effect to the Treaty, the Consul General of France had no authority to demand the rendition of a fugitive criminal, such consul not being an accredited diplomatic agent of the French Government. That an informal translation of an *acte de renvoi* is not a judicial document equivalent to the warrant of arrest of which the party applying for extradition is required to be the bearer according to the statute. That the evidence of criminality to support the demand for extradition must be sufficient to commit for trial according to the laws of the place where the offence is alleged to have been committed. (b)

The Chesapeake case is the only one under the Imp. Stat. 6 & 7 Vic., c. 76. It was decided in 1864, before the suspension of the statute in New Brunswick. The many important points involved in this case have been given in the foregoing pages.

It may be observed, in conclusion, that the Imp. Stat. 6 & 7 Vic., c. 34, makes provision for the apprehension and surrender to the authorities of the place where the offence has been committed, of persons who have committed offences either in the United Kingdom of Great Britain and Ireland, or in any part of Her Majesty's Dominions, whether or not within the said United Kingdom, and who are found in any place in the United Kingdom, or any other part of Her Majesty's Dominions, other than where the offence was committed.

(a) *Re B. G. Burley*, 1 U. C. L. J. N. S. 45, per *Richards*, C. J.

(b) *Ex parte E. S. Lamirande*, 10 L. C. J. 280.

The provisions of this Statute as between the United Kingdom and the Colonies, are very similar to those of our own statutes in aid of the Ashburton Treaty. The enactment only applies to treason, or some felony, such as justices of the peace in general sessions have not authority to try in England under the provisions of an Act passed in the sixth year of the reign of her Majesty, intituled "An Act to define the jurisdiction of Justices in general sessions of the peace." (a)

(a) See s. 10.

## CHAPTER I.

## CRIMES IN GENERAL.

IN the present work it is proposed to treat in the first place of the subject of crimes in general, and the distinctions between a public and a private injury ; secondly, of the persons capable of committing crimes, and their several degrees of guilt, as principals or accessories ; thirdly, of the several species of crimes recognized by law ; after which will follow annotations of the Canadian statutes on Criminal Law and dissertations on the subjects of evidence, pleading and practice, as developed in our own cases.

A crime is the violation of a right when considered in reference to the evil tendency of such violation as regards the community at large. (a)

The proper meaning of the term "crime" is an indictable offence, (b) and it is said that the test of an act being a crime, is whether an indictment will lie for it. (c)

Where an Act declared that every person having a distilling apparatus in his possession, without making a return thereof as therein provided, should forfeit and pay a penalty of \$100, and rendered the apparatus liable to seizure, and forfeiture to the Crown : *Held* that an infringement of this Act was a crime. (d) The violation of a statute containing provisions of a public nature, and more particularly so when that violation is spoken of as

(a) Ste. Bla. Com., Bk 6, p. 94.

(b) *Atty. Gen. v. Radloff*, 10 Ex. 96, per *Martin*, B.

(c) *Re Lucas & McGlashan*, 29 U. C. Q. B., 92, per *Wilson*, J. ; *Bancroft v. Mitchell*, L. R. 2, Q. B. 549. *Reg. v. Master*, L. R. 4 Q. B. 289, per *Mellor*, J.

(d) *Re Lucas & McGlashan*, *supra*, and see *Reg. v. Boardman*, 30 U. C. Q. B. 383.

an offence, and is punishable by fine, or imprisonment as substitutionary for the fine, is a crime in law. (a) When an offence is made a crime by statute, the proceedings instituted for the punishment thereof are criminal proceedings. (b) The distinction between civil and criminal proceeding is this, if the subject matter be of a personal character, that is, if either money or goods are sought to be recovered by the proceeding, that is a civil proceeding; but if the proceeding is one which may affect the defendant at once by the imprisonment of his body, in the event of a verdict of guilty, so that he is liable, as a public offender, that is a criminal proceeding. (c) An information by the Attorney-General for an offence against the revenue laws is a criminal proceeding, being instituted by the Crown for the punishment of a crime. (d)

Offences against the customs and excise laws are not ordinarily treated as criminal proceedings but as penal actions; and the contingent liability to fine and imprisonment does not alter the character of the offence. (e) A proceeding to obtain an order of affiliation under the (N. B.) 1 *rev. stat.* c. 57, is not a criminal proceeding, in which the party charged is punishable on indictment or summary conviction, (f) bastardy not being a crime punishable in this manner. (g)

It is an established principle of the common law that all crimes are considered local, and cognizable only in the place where they were committed. (h) The distinc-

(a) *Re Lucas & McGlashan*, 92, per *Wilson*, J.

(b) *Ib.* 92, per *Wilson*, J. *Bancroft v. Mitchell*, L. R. 2 Q. B. 555, per *Blackburn*, J.

(c) *Ib.* 86-7, per *Richards*, C. J.

(d) *Re Lucas & McGlashan*, 89, per *Richards*, C. J.

(e) *Ex parte Parks*. 3. Allen, 240, per *Carter*, C. J.

(f) *Ex parte Cooke* 4 Allen, 506.

(g) *Ib.*

(h) *The Chesapeake* case, 44 per *Ritchie*, J. *Mure v. Kaye*, 4 Taun. 43, per *Heath*, J.

tion of public wrongs from private, of crimes from civil injuries, principally consists in this, that private wrongs are an infringement or privation of the civil rights of individuals, considered as such: public wrongs or crimes and misdemeanors, are a violation of the same rights, considered in reference to their effect on the community in its aggregate capacity. (a)

The doctrine that all crimes concern the public prevails to such an extent, that by the policy of the law if a civil action is instituted, and it appears on the evidence that the facts amount to felony, the judge is bound to stop the proceedings, and nonsuit the plaintiff, in order that the public justice may be first vindicated by the prosecution of the offender. (b)

The true ground of this rule is to prevent the criminal justice of the country from being defeated, (c) and the principle on which it rests is, not that the felony appearing constitutes any defence to the action, but that by the rule of law the civil remedy is suspended until the defendant charged with the felony shall have been acquitted or convicted in due course of law. (d) The rule applies, whether the plaintiff be the party upon whose person the alleged felony was committed, or a person who can sustain his cause of action only in virtue of a wrong done to him through another, by an act which, as between the defendant and that other, constitutes felony; (e) and it seems the rule equally applies in an action against third persons. (f) The civil remedy is only suspended until an acquittal or conviction after a *bona*

(a) *Ste. Bla. Com.*, Bk. 6, p. 94

(b) *Walsh v. Nattrass* 19 U. C. C. P. 453. *Brown v. Dalby*, 7 U. C., Q. B. 160. *Livingstone v. Massey*, 23 U. C. Q. B. 156. *Williams v. Robinson*, 20 U. C. C. P. 255. *Pease v. M'Aloon*, 1. Kerr. 111.

(c) *Crosby v. Leng*, 12 Ea. 414 per Grose, J.

(d) *Walsh v. Nattrass*, 19 U. C. C. P. 454, per Gwynne, J. *Brown v. Dalby*, 7 U. C. Q. B. 162, per Robinson, C. J.

(e) *Walsh v. Nattrass* *Supra*, 455, per Gwynne, J.

(f) *Pease v. M'Aloon*, 1 Kerr 118, per Parker, J.

*fide* prosecution of the criminal charge. When either event takes place, as the public justice will then be satisfied, the party may proceed with his civil action. (a) It has not been decided whether a complaint to a justice of the peace, and statement on oath of the facts, would or would not be a sufficient prosecution, if the justice should decline to interfere; but at all events it would be sufficient to prefer a bill before the grand jury, who would, of course, ignore it, if the prosecutor's evidence negatived the felonious intent, unless there should appear grounds for suspecting connivance or collusion. (b) A difference has been suggested between the case of a prior conviction and that of an acquittal, namely, that the latter may have been brought about by the defendant colluding with the prosecutor, and it seems evidence would be admissible to show this; (c) and that it would suspend the action. (d)

If there be two acts, the one felonious and the other not, and either one be sufficient to support the action, it may proceed, notwithstanding the evidence of the felony; (e) for it seems that only an action brought to recover compensation for an injury, resulting from the felonious act, is suspended. (f) At all events in case of seduction, unless the loss of service, which is the gist of the action, directly springs from the very act supposed to be felonious, the civil remedy is not defeated. (g)

The question of felony or not cannot be tried by the jury, in the civil action, even though the judge

(a) *Walsh v. Nattrass*, *Supra*. 456. per *Gwynne*, J. *Pease v. M'Aloon*, 1 Kerr. 117. per *Parker*, J. *Edwards v. Kerr*, 13, U. C. C. P. 25, per *Draper*, C. J. *Crosby v. Leng*, 12 Ea. 409

(b) *Pease v. M'Aloon*, 1 Kerr. 117. per *Parker*, J.

(c) *Crosby v. Leng*, 12, Ea. 413-4, per *Lord Ellenborough*, C. J.

(d) *Ib.*

(e) *Walsh v. Nattrass*. 19 U. C. C. P. 457. per *Gwynne*, J.

(f) *Hayle v. Hayle*, 3 U. C. Q. B. O. S. 295.

(g) *Ibid.*

may have a doubt on the evidence as to the facts showing a felony. (a) If a *prima facie* case is made out, and the evidence uncontradicted and unexplained, would warrant a jury in convicting for the felony, the judge should require the party to go before the criminal tribunal, before pursuing his civil remedy. (b)

If the judge is not morally satisfied that a felony has been committed, yet if the act were proved by only one witness, to have been feloniously done, and there were no circumstances inconsistent with such evidence, nothing that could make the disbelief of it otherwise than purely arbitrary, the judge would not be wrong in nonsuiting the plaintiff. (c) It is for the judge to decide whether the case shall go to the jury in the civil action. (d) If the judge has reason for doubting whether the act is felonious but, nevertheless, allows the case to go to the jury, and a verdict is found for the plaintiff, it will not be set aside, as this will only be done in the interests of public justice. (e)

We now proceed to notice the exceptions to the general rule suspending the civil remedy in case of felony. Under "The Temperance Act of 1864," 27 & 28 Vic., c. 18, ss. 40 and 41, the legal representatives of the party may maintain an action for damages against the innkeeper, although the act giving rise to the right of action is also a felony, and the innkeeper has neither been ac-

(a) *Williams v. Robinson*, 20 U. C. C. P. 255. *Walsh v. Nattrass*, 19 U. C. C. P. 453. *Pease v. M'Aloon*, 1 Kerr, 111.

(b) *Pease v. M'Aloon*, *supra*.

(c) *Williams v. Robinson*, 20 U. C. C. P. 256-7, per Hagarty, J. *Brown v. Dalby* 7 U. C. Q. B. 162-3, per Robinson, C. J. See also *Vincent v. Sprague*, 3 U. v. Q. B. 283.

(d) *Walsh v. Nattrass*, 19 U. C. C. P. 456, per Gwynne, J. *Williams v. Robinson* 20 U. C. C. P. 255.

(e) *Walsh v. Nattrass*, *supra*. *Brown v. Dalby*, *supra*. *Williams v. Robinson*, *supra*. See also on this subject *Lutterell v. Reynall*, 1 Mod 283. *Stone v. Marsh*, 6 B. C. 551. *Marsh v. Keating*, 1. Bing. N. C. 198. *Wellock v. Constantine*, 7 L. T. N. S. 751, 32 L. J. Ex 285, 9 Jur. N. S. 232. *Chowne v. Baylis*, 8 Jur. N. S. 1028.



quitted nor convicted. (a) So by the Carriers' Act, (b) the plaintiff may reply that the carrier's servant feloniously broke the goods in respect of which the action is brought, which will, if shown, entitle him to recover, although the servant has not been prosecuted criminally. (c) So, under the Con. Stat. Can., c, 78, the civil action is maintainable, though the act causing the death amounts to felony, and the party has neither been acquitted nor convicted; (d) and, lastly, neither this rule nor the reasons for it apply to the Crown. (e) It is to be regretted that the decisions in Quebec are quite adverse to those in the other Provinces on the above points. This is the only branch of the Criminal Law upon which there is any serious conflict in the decisions of the different Provinces. It has been held in Quebec that the civil remedy is not suspended when a felony is disclosed in evidence, and this with reference to assault, perjury, arson, rape and felony in general. (f)

By the general term crime, is meant such offences only as are punishable by *indictment*. Those of an inferior character, punishable on summary conviction before a justice of the peace, are usually designated offences. (g)

Crimes are divided into two classes, namely, felonies and misdemeanors. (h) Felony is defined as an offence which occasions a total forfeiture of either lands or goods, or both, at the common law, and to which capital or other punishment *may be* superadded, according to the

(a) *McCurdy v. Swift*, 17 U. C. C. P. 126.

(b) 11 Geo 4. and 1 Wm 4, c. 68, s. 8.

(c) *Ib.* 136. per *Wilson*. J.

(d) *Ib.* 136. per *A Wilson*. J. *Clarke v. Wilson*, Rob. Dig. 260.

(e) *Reg. v. Reiffenstein*, 6 C. J. J. N S. 38; 5 U. C. P. R. 175.

(f) *Dagenay v. Hunter*. Rob Dig. 128. *Lamothe v. Chevalier*, 4 L. C. R. 160. *Fortier v. Mercier*. Rob Dig. 127. *Peltier v. Miville*. *ib* *McGuire v. Liverpool and London Assurance Company*, 7 L. C. R. 343. *Neill v. Taylor*, 15 L. C. R. 102

(g) *Sta. Bla. Com.*, Bk. 6. p. 96.

(h) *Re Lucas & McGlashan*, 29 U. C. Q. B., 92, per *Wilson*, J.

degree of guilt. (a) All crimes which are made felonies by the express words of a statute, or to which capital punishment is thereby affixed, become felonies, whether the word "felony" be omitted or mentioned. (b) Where a statute declares that the offender shall, under the circumstances, be deemed to have *feloniously* committed the act, it makes the offence a felony, and imposes all the common and ordinary consequences attending a felony. (c) So where a statute says, that an offence, previously a misdemeanor, "shall be deemed and construed to be a felony," instead of declaring it to be a felony in distinct and positive terms, the offence is thereby made a felony. (d) An enactment that an offence shall be felony, which was felony at common law, does not create a new offence. (e) But an offence shall never be made felony by the construction of any doubtful and ambiguous words of a statute; and, therefore, if it be prohibited under 'pain of forfeiting all that a man has,' or of 'forfeiting body and goods,' or of being at the King's will for body, lands and goods,' it shall amount to no more than a high misdemeanor; (f) and though a statute make the doing of an offence *felonious*, yet, if a subsequent statute make it penal only, the latter statute is considered as a virtual repeal of the former, so far as relates to the punishment of the offence (g). So if an offence be felony by one statute, and be reduced to a misdemeanor by a later statute, the first statute is repealed (h). When a statute on which the indictment is framed is repealed, after the

(a) 4 Bla. Com. 95.

(b) Russ. Cr. 4. Edn. 78. *Reg. v. Horne*. 4 Cox. C. C. 263.

(c) *Rex v. Johnson*, 3 M. & S. 556, per Bayley, J.

(d) *Rex v. Salomons*, R. & M. C. C. R. 292, overruling *Rex v. Cole*, R. & M. C. C. R. 11.

(e) *Reg. v. Williams*, 7 Q. B. 253, per Patteson, J.

(f) Russ. Cr. 79.

(g) *Ib* 79.

(h) *Reg. v. Sherman*, 17 U. C. C. P. 171, per A. Wilson, J. *Rex v. Davis* 1 Leach, 271.

bill has been found by the grand jury, but before plea, the judgment must be arrested (*a*); and where a statute creating an offence is repealed, a person cannot afterwards be proceeded against for an offence within it, committed while it was in operation, even though the repealing statute re-enacts the penal clauses of the statute repealed (*b*). If a later statute expressly alters the quality of an offence, as by making it a misdemeanor instead of a felony, or a felony instead of a misdemeanor, the offence cannot be proceeded for under the earlier statute (*c*); or if a later statute again describes an offence created by a former statute, and affixes to it a different punishment, varying the procedure, and giving an appeal where there was no appeal before, the prosecutor must proceed for the offence, under the latter statute (*d*). If, however, in the case of a common law misdemeanor, a new mode of punishment, or new mode of proceeding, merely be directed, without altering the class of the offence, the new punishment, or new mode of proceeding, is cumulative, and the offender may be indicted as before for the common law misdemeanor. (*e*) Where a statute makes a second offence felony, or subject to a heavier punishment than the first, it is always implied that such second offence ought to be committed after a conviction for the first; (*f*) and where a statute makes an offence felony which was before only a misdemeanor, an indictment will not lie for it as a misdemeanor, (*g*) for the lesser offence merges in the greater. But now,

(*a*) *Reg v. Denton*, 17 Jur. 454. *Reg. v. Swan*, 4 Cox. C. C. 108.

(*b*) *Reg. v. Cummings*, 4 U. C. L. J. 187. per *Macaulay*. C. J.

(*c*) *Michell v. Brown*, 1 E. & E. 267; 28 L. J. (MC) 53. *Reg. v. Sherman*, 17 U. C. C. P. 169, per *A. Wilson*, J. *Rex v. Cross*, 1 Ld. Raym. 711, 3 Salk., 193.

(*d*) *Michell v. Brown*, *supra*.

(*e*) *Rex v. Carlile*, 3 B. & Ald. 161, Arch. Cr. Pldg. 17 edn. 3. See also *Reg. v. Palliser*, 4 L. C. J. 276.

(*f*) *Russ*, Cr. 79.

(*g*) *Rex v. Cross*, 1 Ld. Raym. 711, 3 Salk., 193.

by the 32 & 33 Vic., c. 29 s. 50, although a felony appears on the facts given in evidence, a misdemeanor for which the party may be indicted, will not merge therein, and the party may be convicted of *such* misdemeanor. But the statute has no other effect than to authorize a verdict of guilty on the indictment as it is framed, although the evidence would warrant a conviction for the higher offence. In other words, a party indicted for a misdemeanor cannot, under this clause, be convicted of any *felony* that may be disclosed in evidence, but only of the *misdemeanor* for which he is indicted, if included in the felony proved (a). In this case it was held that a defendant indicted for a misdemeanor, in obtaining money under false pretences, could not, under the Con. Stat. Can., c. 99 s. 62, be found guilty of larceny, although the facts would have warranted such finding.

The word misdemeanor is usually applied to all those crimes and offences for which the law has not provided a particular name (b). A misdemeanor is in truth any crime less than felony, and the word is generally used in contradistinction to felony, misdemeanors comprehending all indictable offences which do not amount to felony, as perjury, battery, libels, conspiracies, and public nuisances (c). *Misprision of felony* is concealment of felony, or procuring the concealment thereof, whether it be felony at the common law or by statute (d).

It is clear that all *felonies* and all kinds of *inferior* crimes of a *public nature*, as misprisions, and all other contempts, all disturbances of the peace, oppressions, misbehaviour by public officers, and all other misdemeanors whatsoever of a *public* evil example against the common law, may be in-

(a) *Reg. v. Ewing*, 21 U. C. Q. B. 523.

(b) *Russ. Cr.* 79.

(c) *Ib.* 79.

(d) *Ib.* 79-80.

dicted (a); and it seems to be an established principle, that whatever openly outrages decency, and is injurious to public morals, is indictable as a misdemeanor at common law (b). If a statute prohibit a matter of public grievance, or command a matter of public convenience, all acts or omissions contrary to the prohibition or command of the statute, being misdemeanors at common law, are punishable by indictment, if the statute specify no other mode of proceeding (c). But no injuries of a private nature are indictable, unless they in some way concern the King (d).

If a statute in terms declare that it shall not be lawful to do a particular act, it seems the doing of it would be indictable, even though the act prescribes a summary remedy (e): and it is not in all cases necessary to annex to it words showing that the intention was to make it an indictable offence, if the statute be violated (f). If an Act of Parliament prohibits a thing being done under some specific penalty, then that penalty is all that can be enforced, but if in a different part of the statute certain consequences are entailed upon the prohibited act, then that is cumulative to the prohibition, and the act done contrary to the prohibition may or may not, according to the subject dealt with, be an indictable offence (g).

When an act is not an offence at common law, but is made an offence by Act of Parliament, an indictment will lie, if there is a substantive prohibitory clause in such statute, though there be afterwards a particular pro-

(a) Russ. Cr. 80.

(b) *Ib.* 80.

(c) *Reg. v. Toronto St. Ry. Co.*, 24 U. C. Q. B., 457 per Draper, C. J. *Rex v. Davis*. Say, 133; and see *Rex v. Sainsbury*, 4 T. R. 451. Russ. Cr. 80.

(d) *Rex v. Richards* 8 T. R. 634. Russ. Cr. 80.

(e) *Pomeroy & Wilson*, 26 U. C. Q. B. 47-8, per Hagarty, J.

(f) *Reg. v. Mercer*. 17 U. C. Q. B. 632, per Burns, J.

(g) *Ib.* 632, per Burns, J.

vision and a particular remedy given. (a) It is stated as an established principle, that when a new offence is created by an Act of Parliament, and a penalty is attached to it by a separate and substantive clause, the prosecutor need not sue for the penalty, but he may proceed on the prior clause, on the ground of its being a misdemeanor. (b) A general prohibitory clause supports an indictment, though there be afterwards a particular provision and a particular remedy. (c) And where a statute forbids the doing of a thing, the doing it wilfully, although without any corrupt motive, is indictable. (d) If a statute enjoin an act to be done, without pointing out any mode of punishment, an indictment will lie for disobeying the injunction of the legislature. (e) This mode of proceeding in such case is not taken away by a subsequent statute, pointing out a particular mode of punishment for such disobedience. (f) Where the same statute which enjoins an act to be done contains also an enactment providing for a particular mode of proceeding as commitment in case of neglect or refusal, it has been doubted whether an indictment will lie. (g) But where a statute only adds a further penalty to an offence prohibited by the common law, there is no doubt that the offender may still be indicted, if the prosecutor think fit, at the common law. (h)

An offence is not indictable where an Act of Parliament has pointed out a particular punishment and a specific method of recovering the penalty which it in-

(a) *Reg. v. Mercer*, 17 U. C. Q. B. 632. per *Burns. J.*; *Reg. v. Mason*, 17, U. C. C. P. 536, per *Richards, C. J.*; *Reg. v. Buchanan*, 8, Q. B. 883; *Reg. v. Crossley*, 10, A. & E. 132.

(b) *Reg. v. Mason. supra* 536, per *Richards, C. J.*

(c) *Ib.* 536, per *Richards, C. J.*

(d) *Rex v. Sainsbury*, 4 T. R. 457. *Reg. v. Holroyd*, 2 M. & Rob. 339.

(e) *Rex v. Davis*, Say, 133. *Reg. v. Price*, 11 A. & E. 727.

(f) *Rex v. Royal*, 2 Burr. 832. Russ. Cr. 87.

(g) *Rex v. Cummings*, 5 Mod. 179. *Rex v. King*, 2 Str. 1268.

(h) Russ. Cr. 88.

flicts; and the rule is certain that where a statute creates a new offence by prohibiting and making unlawful anything which was lawful before, and appoints a specific remedy against such new offence by a particular method of proceeding, that particular method of proceeding must be pursued and no other. (a)

In *Reg. v. Bennett*, (b) it was held that an indictment would not lie on the 3rd sub-section of s. 55 *Con. Stats. Can.*, c. 6, against a deputy returning officer for entering and recording in the poll books the names of several parties as having voted, although they had refused to take the oath required by law, on the ground that the offence was specially created by the statute, and a particular penalty affixed, and a specific remedy for enforcing it pointed out by the 87th section of the Act. Where the penalty is annexed to the offence in the very clause of the Act creating it, no indictment or other proceeding can be taken against the person making default, (c) for the express mention of any other mode of proceeding, impliedly excludes that of indictment. (d)

If a statute specify a mode of proceeding different from that by indictment, then if the matter were already an indictable offence at common law, and the statute introduced merely a different mode of prosecution and punishment the remedy is cumulative, and the prosecutor has still the option of proceeding by indictment at common law or in the mode pointed out by the statute. (e) Even if a statute prohibit under a penalty an act which was before lawful and a subsequent statute, (f)

(a) *Reg. v. Bennet*, 21 U. C. C. P. 237. per Galt, J. *Reg. v. Mason*, 17 U. C. C. P. 536, per Richards, C. J. *Little v. Ince*, 3 U. C. C. P. 542-3, per Macaulay, C. J. See also *Leprohon v. Globenski*, Rob. Dig.

(b) *Supra*.

(c) *Reg. v. Bennet*, *supra* 238, per Galt, J.

(d) *Rex v. Robinson*, 2 Burr 805. *Rex v. Buck*, 1 Str. 679.

(e) *Rex v. Robinson*, 2 Burr 799. *Rex v. Wigg*, 1, Ld. Raym, 1 165. *Rex v. Carlile*, 3 B. & Ald., 161.

(f) *Rex v. Boyall*, 2 Burr 832.

or the same statute in a subsequent clause ordain a mode of proceeding for the penalty different from that by indictment, the prosecutor may, notwithstanding, proceed by indictment upon the prohibitory clause as for a misdemeanor at common law, or he may proceed in the manner pointed out by the statute at his option. (a) Where a Revenue Act, 15 Vic., c. 28, s. 68, enacted that any penalty or forfeiture inflicted under the Act should be recovered by action of debt or information, and sec. 72 enacted that if any person should assault any revenue officer in the exercise of his office he should, on conviction, pay a fine not exceeding £100, nor less than £50, which fine should be paid to the Provincial Treasurer, and in case of non-payment the offender should be imprisoned for a term not exceeding twelve months nor less than three months, at the discretion of the court; *held* that the Act only limited the discretion of the court as to the amount of fine and imprisonment on conviction for an assault under sec. 72, but did not alter the ordinary mode of proceeding therefor by indictment. (b) This, however, was not a proceeding to recover a penalty under this Act, but a prosecution for an assault which is at common law the subject of an indictment, and punishable by fine and imprisonment. (c) Where a person filling a public office wilfully neglects or refuses to discharge the duties thereof, and there is no special remedy or punishment pointed out by statute, an indictment will lie as there would otherwise be no means of punishing the delinquent. (d) So an indictment will lie for neglecting, or refusing to administer the oath set forth in the Con. Stat. Can. c. 6, s. 55, at the request of the candidate or his agent. (e)

(a) *Rex v. Wright*, 1 Burr 543. *Rex v. Buchanan*, 7 Q. B. 883. Arch. Cr. Pld. 17. edn 2.

(b) *Reg. v. Walsh*, 3 Allen 54.

(c) *Ib.* see N. B. Rev. Stat., c. 29, s. 15, and c. 148, s. 4.

(d) *Reg. v. Bennet*, 21 U. C. C. P. 238 per Galt, J.

(e) *Ib.* 238 per Galt, J.



An attempt to commit a misdemeanor is a misdemeanor (a) whether the offence was created by statute or existed at common law, (b) for when an offence is made a misdemeanor by statute it is made so for all purposes. (c) So inciting another to commit a misdemeanor is in itself a misdemeanor. (d) In this case it was held that attempting to bargain with or procure a woman falsely to make the affidavit provided for by the Con. Stats. U. C., c. 77, s. 6, that A was the father of her illegitimate child, was an indictable offence, on the ground that if the oath were taken and proved to be false, it would have amounted to perjury under the Con. Stats. U. C., c. 2, s. 15, or, at all events, to a misdemeanor, and inciting another to commit perjury is a misdemeanor on the above principle. On an indictment for misdemeanor the jury may find the prisoner guilty of any lesser misdemeanor that is necessarily included in the offence as charged, (e) and on an indictment for felony or misdemeanor the jury may find the party guilty of an attempt to commit it, which is a misdemeanor. (f) Under this statute (32 & 33 Vic., c. 29, s. 49) two prisoners may be convicted of misdemeanor, though one is charged with attempting to commit a felony, and the other as *aiding* and *abetting* him in the attempt. An indictment charged H with rape, and U with aiding and abetting him in the rape, the jury having found H and U guilty of a misdemeanor, H of *attempting* to commit the rape, and U of *aiding* him in the attempt: *Held* that they were both properly convicted under the 14 & 15 Vic., c. 100, s. 9. (g) But upon

(a) *Reg. v. Connolly*, 26 U. C. Q. B. 322 per *Hazart*, J. *Reg. v. Martin*, 9 C. & P., 213 *Reg. v. Goff*, 9 U. C. C. P. 438.

(b) *Rex. v. Butler* 6 C. & P. 368 per *Patterson*, J. *Rex. v. Roderick*, 7 C. & P. 795. *Parke*, B. *Rex v. Cartwright* Russ. & Ry 107.

(c) *Rex. v. Roderick* *supra* 795. per *Parke*, B.

(d) *Reg. v. Clement*, 26 U. C. Q. B. 297.

(e) *Reg. v. Taylor*, L. R. 1 C. C. R. 196. per *Kelly*, C. B.

(f) *Reg. v. Goff*, 9 U. C. C. P. 438. 32 & 33 Vic., c. 29, s. 49.

(g) *Reg. v. Hapgood*, L. R. 1 C. C. R. 221.

this clause the defendant can only be convicted of an attempt to commit the very offence with which he is charged. (a) Nor can the jury convict under it of an attempt which is made felony by statute, but only of an attempt which is a misdemeanor. (b) But on an indictment for rape the prisoner may be convicted of an attempt to commit the rape, though the attempt is felony by statute, and the indictment is in the ordinary form. (c) An attempt to commit a felony, is also a misdemeanor, (d) and an attempt to obtain money under false pretences is a misdemeanor. (e)

The act of attempting to commit a felony must be immediately and directly tending to the execution of the principal crime, and committed by the prisoner under such circumstances that he has the power of carrying his intention into execution. (f) Where, the prisoners being indicted for an attempt to commit burglary, it appeared that they had agreed to commit the offence on a certain night together with one C, but C was kept away by his father, who had discovered their design. The two prisoners were seen about twelve o'clock that night to enter a gate about fifty feet from the house; they came towards the house to a picket fence in front, in which there was a small gate, but they did not come nearer the house than twelve or thirteen feet, nor did they pass the picket gate; they then went, as was supposed, to the rear of the house and were not seen afterwards. About two o'clock some persons came to the front door and turned the knob but went off on being alarmed and were not identified :

(a) *Reg. v. McPherson*, *Dears. & B.* 197, 26 L. J. (M. C.) 134.

(b) *Reg. v. Connell*, 6 Cox 178.

(c) *Reg. v. Webster*, 9 L. C. R. 196.

(d) *Reg. v. Goff*, 9 U. C. C. P. 438 per *Draper*, C. J. *Reg. v. Esmonds*, 26 U. C. Q. B. 152.

(e) *Reg. v. Goff*, *supra*.

(f) *Reg. v. McCann*, 28, U. C. Q. B. 517. per *Morrison*, J. *Reg. v. Taylor*, 1 F. & F. 511.

*Held* that there was no evidence of an attempt to commit the offence, no overt act directly approximating to its execution, and that a conviction therefor could not be sustained. (a) If, however, it had been proved that they attempted to enter the house, and were either interrupted or surprised in doing so, and made their escape, and that but for such surprise or interruption they could have carried out their design of stealing certain money said to be in the house, there would have been evidence to go to the jury. (b) A conviction for an attempt to commit a felony cannot be supported unless it appears upon the evidence that the felony might have been completed if there had been no interruption. If, therefore, upon an indictment for attempting to commit a felony by putting the hand into a woman's pocket with intent to steal her property therein, it appears that she had nothing in her pockets, a conviction cannot be sustained. (c)

The prisoner was indicted for breaking and entering a shop with intent to commit felony, which by (24 & 25 Vic., c. 96, s. 57) the corresponding English section of the 32 & 33 Vic., c. 21, s. 56, is made felony. He was seen upon the roof, where a hole was found broken in, but there was no evidence of his having entered the building. The jury were directed that if they thought he broke the roof with intent to enter the shop and steal, they might find him guilty of misdemeanor in attempting to commit that felony, and they found him guilty of the misdemeanor: *Held* that the conviction was right. (d)

(a) *Reg. v. McCann*, *supra*

(b) *Ib.* 516, per *Morrison J.*; see also *Reg. v. Eagleton*, 1 U. C. L. J. 179; *Dears*, C. C. 515; *Reg. v. Roberts*, *ib.* 539; *Rex v. Martin*, 2 Mood. C. C. 123; 9 C. & P. 213-215; *Dugdale v. Reg.*, 1 E. & B. 435.

(c) *Reg. v. Collins*, L. & C. 471, 33 L. J. (M. C.) 177, 10 U. C. L. J. 308.

(d) *Reg. v. Bain*, 8 U. C. L. J. 279; L. & C. 129; 31 L. J. (M. C.) 88.

But *attempting* to commit a felony is clearly distinguishable from *intending* to commit it, for the bare wish or desire of the mind to do an illegal act is not indictable. So long as an act rests in bare *intention* it is not punishable by our laws, (a) but immediately when an act is done the law judges not only of the act itself, but of the intent with which it was done, (b) and an act, though otherwise innocent, if accompanied by an unlawful and malicious intent, the intent being criminal the act becomes criminal and punishable. (c)

It has been held under the corresponding English section of the 31 Vic., c. 72, s. 2, that the offence of soliciting and inciting a man to commit a felony is, where no such felony is actually committed, a misdemeanor only, and not a felony under the Act which only applies to cases where a felony is committed as the result of the counselling and procuring therein mentioned. (d) A disregard of, or non-compliance with, a positive command in an Act of Parliament is indictable as a misdemeanor. (e) Defendants' Act of Incorporation required that the rails of their railway should be laid flush with the streets and highways, and that the railway track should conform to the grades of the same, so as to offer the least possible impediment to the ordinary traffic of the said streets and highways: *Held* that the omission to lay the rails flush with the street would be indictable without showing that any unnecessary impediment was offered to the traffic. (f)

The motives of a party, though unimportant in

(a) *Reg. v. Mulcahy* L. R. 3 E & I. App. 317. per Willes, J.

(b) *Reg. v. McCann*. 28 U. C. Q. B. 516. per Morrison, J. *Reg. v. McPherson*, 1 Dears & B. C. C.. 197, per Cockburn, C. J. *Reg. v. Higgins*, 2 Ka. 5, per Le Blanc, J. *Reg. v. Scofield* Cald. 403.

(c) *Reg. v. Bryans* 12 U. C. C. P. 172. per Hagarty, J.

(d) *Reg. v. Gregory*. L. R. 1 C. C. R. 77.

(e) *Reg. v. Toronto St. Ry. Co.*, 24, U. C. Q. B. 454.

(f) *Ib.*

civil cases, may be taken into account in criminal proceedings. (a) In the latter, however, the maxim, *actus non facit reum nisi mens sit rea*, does not hold universally. When a particular act is positively prohibited by law, it becomes thereupon *ipso facto* illegal to do it wilfully, and in some cases even ignorantly, and a party may be indicted for doing it without any corrupt motive. (b) Where a statute, in order to render a party criminally liable, requires the act to be done feloniously, maliciously, fraudulently, corruptly, or with any other expressed motive or intention, such motive or intention is a necessary ingredient in the crime; but where the enactment simply prohibits the doing of an act, motive or intention is immaterial so far as regards the legal liability of the party committing the forbidden act: (c) and it would seem that a party cannot exempt himself from criminal liability on the ground that his object was lawful, or even laudable, in committing an act simply prohibited by law; (d) for the law infers that every person intends the natural consequences of his own act when that act is wrongful, injurious, and without legal justification. (e) The inference equally arises although the party has an honest or laudable object in view, and he will nevertheless be legally liable, unless the object is such as, under the circumstances, to render the act lawful. (f)

Misdemeanors differ from felonies in these particulars—the crime is of an inferior degree, and the penal consequences are not so severe; secondly, all persons concerned in the commission of a misdemeanor, if guilty

(a) *Phillips v. Eyre*, L. R. 6, Q. B. 21, per *Willes*, J.

(b) *Rex v. Sainsbury*, 4 T. R. 457, per *Ashurst*, J.

(c) 4, C. L. J. N. S. 194.

(d) *Reg. v. Hicklin*, L. R. 3, Q. B. 330. 18 W. R. 801. 18 L. T. Reps. N. S. 395.

(e) *Ib.*

(f) *Ib.* 375, per *Blackburn*, J.; and see *Reg. v. Salter*, 3 Allen, 327, per *Carter*, C. J.

**at all, are principals, and the law recognises no *degrees* in their guilt.**

**With regard to the punishment of misdemeanors, it is a general rule that all those offences less than felony which exist at common law, and have not been regulated by any particular statute, are within the discretion of the court to punish, (a) and the punishment usually inflicted is fine and imprisonment. (b) The punishment of felonies is generally prescribed by statute.**

**(a) *Rest. Cr.* 92.**

**(b) *Ib.* 92.**

## CHAPTER II.

THE PERSONS CAPABLE OF COMMITTING CRIMES, AND THEIR  
SEVERAL DEGREES OF GUILT.

As a *prima facie* criminal liability attaches on every person, it is necessary to consider what defences may, in different cases, be urged by different persons, as grounds of exemption from punishment. The law requires an exercise of understanding and of will to render a person criminally responsible, therefore a want or defect of either may be a good defence. (a)

*Infants.*—The general rule is, that infants under the age of discretion are not punishable by any criminal prosecution whatever, but the age of discretion varies according to the nature of the offence. (b) Thus, in some misdemeanors and offences, that are not capital, an infant is privileged, by reason of his nonage if under twenty-one; for instance, if the offence charged by the indictment be a mere nonfeasance, unless it be such as he is bound to do by reason of his tenure, or the like as to repair a bridge, (c) then, in some cases he shall be privileged, if under twenty-one, because laches shall not be imputed to him. (d) But if he be indicted for any notorious breach of the peace, as riot, battery, or for perjury, or cheating, or the like, he is equally liable as a person of full age, because upon his trial the Court, *ex officio*, ought to consider whether he was *doli capax*, and had discretion

(a) Russ. Cr. 6.

(b) Arch. Cr. Pldg. 16.

(c) *Rex v. Sutton*, 3 A. & E. 597.

(d) Arch. Cr. Pldg. 17.

to do the act with which he was charged. (a) The law as to an infant's liability is more clearly defined with reference to capital crimes, though their criminal responsibility does not so much depend upon their age as upon their judgment and intelligence. (b) But within the age of seven years, no infant can be guilty of felony, or be punished for any capital offence, for within that age there is an irrebuttable presumption of law that he has no mischievous discretion. (c) On attaining the age of fourteen years, they are presumed to be *doli capaces*, and capable of discerning good from evil, and are, with respect to their criminal actions, subject to the same rule of construction as others of more mature age. (d)

Between the age of seven and fourteen years, an infant shall be deemed *prima facie* to be *doli incapax*, but *malitia supplet ætatem*, and this presumption may be rebutted by strong and pregnant evidence of mischievous discretion, establishing it beyond all doubt and contradiction. (e) When a child between the ages of seven and fourteen years is indicted for felony, two questions are to be left to the jury—first, whether he committed the offence; and secondly, whether at the time he had a guilty knowledge that he was doing wrong. (f)

An infant under fourteen is presumed by law to be unable to commit a rape, and, therefore, cannot be found guilty of it, and this on the ground of impotency, as well as the want of discretion. This presumption, it seems, is not affected by the 32 & 33 Vic., c. 20, s. 65—making the offence complete on proof of penetration, without evidence of emission. (g) Nor is any evidence admis-

(a) *Ib.* 17.

(b) *Russ. Cr.* 7

(c) *Russ. Cr.* 7; *Marsh v. Loader*, 14 C. B. N. S. 535.

(d) *Arch. Cr. Pldg.* 16.

(e) *Arch. Cr. Pldg.* 16.

(f) *Rex v. Owen*, 4 C. & P. 236.

(g) *Rex v. Groombridge*, 7 C. & P. 582.



sible to shew that, in fact, the defendant had arrived at the full state of puberty, and could commit the offence. (a) But he may be principal in the second degree if he aid and assists in the commission of the offence, and it appears that he has a mischievous discretion. (b)

It seems a Statute creating a new felony does not extend to infants under the age of discretion, (c) and that Statutes giving corporal punishment do not bind infants, but other and general statutes do, if infants are not excepted. (d) And where a fact is made felony, or treason, it extends as well to infants, if above fourteen, as to others. (e)

Where the defendant, an indented apprentice, was convicted before two Justices, under the Acts of Assembly, for making brooms, contrary to an agreement contained in an indenture executed by him while an infant:—*Held* that the conviction was bad. (f)

*Persons Non Compotes Mentis*—Every person, at the age of discretion, is, unless the contrary be proved, presumed by law to be sane, and to be accountable for his actions. But if there be an incapacity, or defect of the understanding, as there can be no consent of the will, so the act cannot be culpable. (g) Where the deprivation of the understanding and memory is total, fixed, and permanent, it excuses all acts, so, likewise, a man labouring under adventitious insanity is, during the frenzy, entitled to the same indulgence, in the same degree, with one whose disorder is fixed and permanent. (h)

(a) *Rex v. Philips*, 8 C. & P. 736; *Rex v. Jordan*, 9 C. & P. 118; *Rex v. Brimilow*, *ib.* 336, 2 Mood. C. C. 122.

(b) *Rex v. Eldershaw*, 3 C. & P. 396; see *Rex v. Allen*, 1 Den. C. C. 364, Arch. Cr. Pldg. 17.

(c) Russ. Cr. 10.

(d) Dwarria 516.

(e) Russ. Cr. 10.

(f) *Reg. v. Harris*, 1 Allen, 100.

(g) Arch. Cr. Pldg. 17.

(h) *Id.* 18; *Beverley's Case* Co. 125.

It seems clear, however, that to excuse a man from punishment on the ground of insanity, it must be proved distinctly that he was not capable of distinguishing right from wrong at the time he did the act, and did not know it to be an offence against the laws of God and nature. (a) If there be a partial degree of reason; a competent use of it sufficient to restrain those passions which produce the crime: if there be thought and design; a faculty to distinguish the nature of action; to discern the difference between moral good and evil,—then he will be responsible for his actions. (b)

Where the intellectual faculties are sound, mere moral insanity,—where a person knows perfectly well what he is doing, and that he is doing wrong, but has no control over himself, and acts under an uncontrollable impulse,—does not render him irresponsible. (c) Whether the prisoner were sane or insane at the time the act was committed is a question of fact triable by the jury, and dependent upon the previous and contemporaneous acts of the party.

Upon a question of insanity, a witness of medical skill may be asked whether, assuming certain facts proved by other witnesses to be true, they, in his opinion, indicate insanity. (d) It is said that, as to the criminal liability of a lunatic, the maxim is, *actus non facit reum nisi mens sit rea*. (e).

Imbecility, and loss of mental power, whether arising from natural decay, or from paralysis, softening of the brain, or other natural cause, although unaccompanied by frenzy, or delusion of any kind, constitutes unsound-

(a) *Rex v. Offord*, 5 C. & P. 168.

(b) *Reg. v. McNaughton*, 10 Cl. & Fin. 200; 1 C. & K. 130 n.; *Rex v. Higgins*, 1 C. & K. 129.

(c) *Rex v. Burton*, 3 F. & F. 772.

(d) *Reg. v. Frances*, 4 Cox. 57, per Alderson B. and Cresswell, J.; *Reg. v. Wright, R. & R.* 456; *Reg. v. Searle*, 1 M. & Rob. 75; Arch. Cr. Pldg. 19.

(e) *Jagyard v. Innes*, 12 U. C. C. P. 77, per Draper, C. J.

ness of mind, amounting to lunacy, within 8 & 9 Vic. c. 100. (a)

It is the duty of the Government to assume the care and custody of persons acquitted of criminal charges on the ground of insanity, and this power is vested in the Government, independently of any statute. (b) The policy of the law in detaining insane persons in custody is to prevent them from committing the same offences again. (c)

The vice of drunkenness, which produces a perfect though temporary frenzy, or insanity, will not excuse the commission of any crime; and an offender under the influence of intoxication can derive no privilege from a madness voluntarily contracted, but is answerable to the law equally as if he had been in the full possession of his faculties at the time. (d) It has been said that, upon an indictment for murder, the intoxication of the defendant may be taken into consideration as a circumstance to shew that the act was not premeditated. (e) But if the primary cause of the frenzy be involuntary, or it has become habitual and confirmed, this species of insanity will excuse the offender equally as the other descriptions of this malady. (f)

*Persons in Subjection to the Power of Others.*—In general, a person committing a crime will not be answerable if he was not a free agent and was subject to actual force at the time the act was done. (g) This exemption also exists in the public and private relations of society; public as between subject and prince, obedi-

(a) *Reg. v. Shaw*, L. R. 1 C. C. R. 145, 37 L. J. (M. C.) 112.

(b) *Reg. v. Martin*, 1 James, 322.

(c) *Ib.* 324, per *Bliss, J.*; see as to insane persons 32 & 33 Vic., c. 29, s. 99 *et seq.*

(d) Arch. Cr. Pldg. 18.

(e) *Reg. v. Grindley*, 1 Russ. 8.; *Reg. v. Thomas*, 7 C. & P. 817; *Reg. v. Meakin*, *ib.* 297; but see *Reg. v. Carroll*, *ib.* 145.

(f) Arch. Cr. Pldg. 18.

(g) Russ. Cr. 32.

ence to existing laws being a sufficient extenuation of civil guilt before a municipal tribunal; and private, proceeding from the matrimonial subjection of the wife to the husband, from which the law presumes a coercion which, in many cases, excuses the wife from the consequences of criminal misconduct. The private relations which exist between parent and child, and master and servant, will not, however, excuse or extenuate the commission of any crime of whatever denomination; for the command is void in law and can protect neither the commander nor the instrument. (a) In general, if a crime be committed by a *feme covert* in the presence of her husband, the law presumes that she acted under his immediate coercion, and excuses her from punishment. (b) But if she commit an offence in the absence of her husband, even by his order or procurement, her coverture will be no defence (c); even though he appear at the very moment after the commission of the offence; and no subsequent act of his, though it may render him accessory to the felony of his wife, can be referred to what was done in his absence. (d) This presumption, however, may be rebutted by evidence; and if it appear that the wife was principally instrumental in the commission of the crime, acting voluntarily and not by restraint of her husband, although he was present and concurred, she will be guilty and liable to punishment. (e)

The protection does not extend to crimes which are *mala in se*, and prohibited by the law of nature, nor in such as are heinous in their character, or dangerous in their consequences; and, therefore, if a married woman be guilty

(a) Arch. Cr. Pldg. 22.

(b) *Ib.* 22; and see *Reg. v. Smith*, Dears. & B. C. C. 553.

(c) *Ib.* 22; 2 Leach C. C 1102; *Reg. v. Morris*, R. & R. 270.

(d) *Reg. v. Hughes*, 1 Russ 21.

(e) *Reg. v. Cohen*, 11 Cox 99; *Reg. v. Dicks*, 1 Russ. 19; *Reg. v. Hammond*, Leach, 447 Arch. Cr. Pldg. 22.

of treason, murder, or offences of the like description, in company with, or by coercion of, her husband, she is punishable equally as if she were sole. (a) So a married woman may be indicted jointly with her husband for keeping a bawdy house, (b) or gaming house, (c) for these are offences connected with the government of the house in which the wife has a principal share. (d) According to the prevailing opinion, it seems the wife may be indicted with her husband in all misdemeanors. (e) If a married woman incite her husband to the commission of a felony, she is accessory before the fact. (f) But she cannot be treated as an accessory for receiving her husband, knowing that he has committed a felony, nor for concealing a felony jointly with her husband, (g) nor for receiving from her husband goods stolen by him. (h) And she will not be answerable for her husband's breach of duty, however fatal, though she may be privy to his misconduct, if no duty be cast upon her, and she is merely passive. (i)

*Ignorance.* — The laws can only be administered upon the principle that they are known, because all persons are bound to know and obey them. (j) A mistake, or ignorance of law, is no defence for a party charged with a criminal act; (k) but it may be ground for an application to the merciful consideration of the Government. (l) But ignorance, or mistake of fact, may, in some

(a) *Ib.* 23; see *Reg. v. Cruise*, 8 C. & P., 541, 2 Mood. C. C. 53; *Reg. v. Manning*, 2 C. & K. 903 n.

(b) *Reg. v. Williams*, 10 Mod. 63, 1 Salk. 384

(c) *Reg. v. Dixon*, 10 Mod. 335.

(d) Arch. Cr. Pldg. 23.

(e) *Ib.* 23; *Reg. v. Ingram*, 1 Salk. 384; but see *Reg. v. Price*, 8 C. & P. 19.

(f) *Reg. v. Manning*, 2 C. & K. 903 n.

(g) Arch. Cr. Pldg. 23.

(h) *Reg. v. Brooks*, Dears C. C. 184; see *Reg. v. Archer*, 1 Mood. C. C. 143.

(i) *Reg. v. Squires*, 1 Russ. 16; Arch. Cr. Pldg. 23.

(j) *Reg. v. Moodie*, 20 U. C. Q. B. 399, per Robinson, C. J.

(k) *Ib. Unwin & Clark*, L. R. 1 Q. B. 417; *Reg. v. Mayor Teakesbury*, L. R. Q. B. 635, per Blackburn, J.

(l) *Reg. v. Madden*, 10 L. C. J. 344, per Johnson, J.

cases, be a defence ; (a) as, for instance, if a man intending to kill a thief in his own house, kill one of his own family, he will be guilty of no offence. (b) But this rule proceeds upon a supposition that the original intention was lawful ; for if an unforeseen consequence ensue from an act which was in itself unlawful, and its original nature wrong and mischievous, the actor is criminally responsible for whatever consequences may ensue. (c)

*Principals in the First and Second Degrees.*—The general definition of a principal in the first degree is one who is the actor or actual perpetrator of the fact. (d) Principals in the second degree are those who are present aiding and abetting at the commission of the fact. (e) To prove a person an aider or abettor, it must be shewn either that he was actually present aiding and in some way assisting in the commission of the offence, or constructively present for the same purpose—that is, in such a convenient situation as readily to come to the assistance of the others, and with the intention of doing so, should occasion require. (f) But there must be some participation, for the fact that a person is actually present at the commission of a crime does not necessarily make him an aider or abettor. If one sees a felony is about to be committed, and in no manner interferes to prevent it, he does not thereby participate in the felony committed, so as to render him liable as a principal in the second degree. It should be proved that he did or said something shewing his consent to the felonious purpose, and contributing to its execution. (g)

(a) *Unwin & Clark*, supra, 424, per *Blackburn*, J. ; *Rider v. Wood*, 29 L. M. 1.

(b) *Reg. v. Levett*, Cro. Car. 538.

(c) Arch. Cr. Pldg. 24.

(d) Arch. Cr. Pldg. 7.

(e) *Id.* 8.

(f) *Ashley v. Dundas*, 5 U. C. Q. B. O. S. 753, per *Sherwood*, J. ; *Reg. v. Curtley*, 27 U. C. Q. B. 617, per *Morrison*, J.

(g) *Reg. v. Curtley*, 27 U. C. Q. B. 619, per *Morrison*, J.

If a fact amounting to murder should be committed in prosecution of some unlawful purpose, though it were but a bare trespass, all persons who had gone in order to give assistance, if necessary, for carrying such unlawful purpose into execution, would be guilty of murder. But this applies only to a case where the murder is committed in *prosecution* of some unlawful purpose—some common design, in which the combining parties were united, and for the effecting whereof they had assembled. (a) For when the act of homicide is not done with the concurrence of all those present, there must be evidence of a precedent common purpose to prosecute the unlawful enterprise, even to the extent of extreme and deadly violence. (b) Even in case of felony, there must either be a previous or present concurrence in the act by all to render them liable, (c) otherwise none but the party actually committing the act will be liable. (d)

In Curtley's case, the prisoner C. was indicted for aiding and abetting one M. in a murder, of which M. was convicted. It appeared that, about six in the evening, the deceased was with R. and his wife on the river bank at Amherstburg, standing near a pile of wood. R.'s wife saw M. standing behind the pile, who, on deceased going up to him, struck deceased with a stick, of which he died. Some time afterwards, deceased ran, when two other men sprang out, and followed him; but in a few seconds two of them returned, and assaulted her and her husband. She could not identify the prisoner. Two other witnesses saw deceased running from the direction of the wood pile, and across the road, when he fell over a stick

(a) *Reg. v. Curtley*, 27 U. C. Q. B. 617, per *Morrison*, J.

(b) *Ib.* 617, per *Morrison*, J.; *Rex v. Collison*, 4 C. & P. 565; *Reg. v. Howell*, 9 C. & P. 450.

(c) *Ib.* 617, per *Morrison*, J.; *Reg. v. Franz*, 2 F. & F. 580.

(d) *Ib.* 617, per *Morrison*, J.; *Reg. v. Skeet*, 4 F. & F. 931; *Reg. v. Price*, 8 Cox C. C. 96.

of timber. They saw a man, at the same time, come running from the wood pile, and, as deceased got up, he struck him with a stick, knocking him down, and again struck him on the head, and then the man ran off to the north. One of them identified this man as M., but the other did not know him. One witness, B., swore that, about six on that evening, deceased left his office with R. and his wife, and that, about twenty minutes after, he saw the prisoner, with M. and another, go into the vacant lot where the wood pile was, M. having a stick in his hand, and heard M. say to the others, "Let us go for him." It was also proved by others that, before the affray, the three were together near the wood pile in question, and were also in a saloon together about nine o'clock afterwards. The prisoner was convicted on this evidence, and a rule *nisi* was obtained for a new trial on his behalf, on the ground that there was no evidence to go to the jury sufficient to justify his conviction. The rule was made absolute, for there was no direct proof that the prisoner was present when the blows were struck, or when the affray began, and no evidence whatever that he and the others were together with any common unlawful purpose, and the expression used by M. "Let us go for him," in the absence of evidence that M. was alluding to the deceased, or that the prisoner and M. were aware that the deceased was at the wood pile, was unimportant *per se*, as indicating the intention of the parties, and was obviously susceptible of different applications. (x)

Whenever a joint participation in an act is shewn, or there is a general resolution against all opposers, each person is liable for every act of the others, in furtherance of the common design. (y) And if a number of persons are

(x) *Reg. v. Curtley*, 27 U. C. Q. B. 613.

(y) *Reg. v. Slavin*, 17 U. C. C. P. 205; Russ. Cr. 56.



confederated for an unlawful purpose, and in pursuit of their object commit felony, any person present in any character, aiding and abetting, or encouraging the prosecution of the unlawful design, is involved in a share of the common guilt. (a)

But this doctrine will apply only to cases where the act intended to be accomplished is *unlawful in itself*. For if the original purpose is lawful and prosecuted by lawful means, if one of the party commit a felonious act, the others will not be involved in his guilt, *unless they actually aided or abetted him in the fact*. (b) In other words, a felonious act committed by one person in *prosecution* of a common unlawful purpose is the act of all, but if the purpose is lawful, the person committing the act will alone be liable. By an unlawful purpose is meant such as is either felonious, or if it be to commit a misdemeanor, then there must be evidence to shew that the parties engaged intended to carry it out at all hazards. (c) The act must also be committed in *prosecution* of the unlawful purpose, and be the result of the confederacy. (d)

A prisoner was convicted of unlawfully attempting to steal the goods of one J. G. It appeared that he had gone with one A. from Toronto to Cooksville, and examined J. G.'s store, with a view of robbing it; and that afterwards A. and three others having arranged the scheme with the prisoner, started from Toronto, and made the attempt, but were disturbed, after one had gone into the store through a panel taken out by them: the prisoner saw them off from Toronto, but did not go himself: *Held* that as those actually engaged were

(a) *Reg. v. Lynch*, 26 U. C. Q. B. 208; see also *Reg. v. McMahon*, 26 U. C. Q. B. 195.

(b) *Russ. Cr.* 56.

(c) *Reg. v. Skeet*, 4 F. & F. 931; see also *Reg. v. Luck*, 3 F. & F. 483; *Reg. v. Crow*, 8 Cox 335.

(d) *Reg. v. White, R. & R.*, 99; *Arch. Cr. Pldg.*, 950.

guilty of an attempt to steal, and as the evidence established, the prisoner had counselled and procured the doing of that act, and as such attempt was a misdemeanor, being an attempt to commit a felony, the prisoner, under the 31 Vic., c. 72, s. 9, was properly convicted. (a) This statute is clear, that if the prisoner was accessory before the act, he could be indicted as if he were personally present. (b)

J. and T. were driving a trap along the turnpike road for a lawful purpose. J. got out of the trap, and went into a field and shot a hare, which he gave to T., who had remained in the trap. J. having been convicted of trespass in pursuit of game, an information was laid under the 11 & 12 Vic., c. 43, against T., charging him with being present aiding and abetting. On a case stated by the justices, it was held that there was abundant evidence on which the justices might have come to the conclusion that both were engaged in a common purpose, and that T. was guilty. (c)

"Upon an indictment against E., H., and another for stealing and receiving, it was proved that H. was walking by the side of the prosecutrix, and E. was seen just previously following her. The prosecutrix felt a tug at her pocket, and found her purse gone, and, on looking round, saw H. walking with E. in the opposite direction, and saw H. handing something to him. The jury were directed that if they did not think from the evidence that E. was participating in the actual theft, it was open to them on these facts to find a verdict of receiving. The jury found H. guilty of stealing, and E. of receiving: Held that upon the finding of the jury, E. was not a principal in the second degree, as the jury had not found

(a) *Reg. v. Esmonde* 26 U. C. Q. B. 152.

(b) *Ib.*, per *Hagarty*, J.

(c) *Stacey v. Whitehurst*, 13 W. R. 384.

that he was acting in concert with the other prisoner in the theft, and that the conviction was right as well as the direction to the jury. It was objected, that upon the facts proved the jury should have been told to find E. guilty of stealing or of no offence. Upon the facts he was a principal in the second degree, aiding and abetting, present, and near enough to afford assistance. *Williams, J.*: that is not enough to constitute a principal in the second degree; there must be a common purpose and intention. *Wightman, J.*, thought that the jury might very well have inferred concert, but they had not done so. (a)

A count alleging that A. and B., on the day and year aforesaid, and at the village of A. unlawfully, fraudulently, and knowingly were present, aiding, abetting, and assisting the said C., the misdemeanor aforesaid to commit, discloses an indictable offence, and is good in law, and charges A. as a principal in the second degree. (b)

*Accessories before and after the fact.*—An accessory before the fact, is he who, being absent at the time of the felony committed, doth yet procure, counsel, command, or abet another to commit a felony. (c) An accessory after the fact is one who knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon. (d) It is only in felonies that there can be accessories, for in misdemeanors all are principals. (e) By the 31 Vic., c. 72, s. 9, aiders and abettors in misdemeanors are liable to be indicted, tried, and punished as principal offenders. There may be accessories to a new statutory felony, in the same manner as

(a) *Reg. v. Hilton*, 5 U. C. L. J. 70 Bell 24; 28 L. J. (M. C.) 28.

(b) *Reg. v. Connor*, 14 U. C. C. P. 529.

(c) Arch. Cr. Pldg. 11.

(d) *Ib.* 14.

(e) *Reg. v. Tisdale*, 20 U. C. Q. B. 273, per *Robinson, C. J.*; *Reg. v. Campbell*, 18 U. C. Q. B. 417, per *Robinson, C. J.*; *Reg. v. Benjamin*, 4 U. C. C. P. 189, per *Macaulay, C. J.*

to felony at common law (*a*) ; for, if a statute creates a felony or misdemeanor, it, by implication, forbids counselling, aiding, or abetting the offence ; and the common law alone supplies a remedy. But, in addition to this, the Act respecting accessories, (*b*) expressly extends to felonies, by virtue of any Act *to be* passed. (*c*)

There can be no accessories to a felony unless a felony has been committed. (*d*) Ordinarily, there can be no accessories before the fact in manslaughter, for the offence is sudden and unpremeditated. (*e*) Where, however, the prisoner procured and gave a woman poison, in order that she might take it, and so procure abortion, and she did take it in his absence and died of its effects, it was held that he might be convicted as an accessory before the fact to the crime of manslaughter. (*f*) There may, however, be accessories after the fact in manslaughter. (*g*) The offence of an accessory is distinguishable from that of a principal in the second degree : the latter must be actually or constructively present at the commission of the fact. But it is essential to constitute the offence of accessory that the party should be absent at the time the offence is committed. (*h*) On an indictment charging a man as a principal felon only, he cannot be convicted of the offence of being an accessory after the fact. (*i*)

The principle of law, both in civil and criminal cases, is that a person is liable for what is done under his pre-

(*a*) Dwarria 516.

(*b*) 31 Vic., c. 72.

(*c*) *Reg. v. Jesse Smith*, L. R. 1 C. C. R. 266, per Bovill, C. J.

(*d*) *Reg. v. Gregory*, L. R. 1 C. C. R. 77 ; 36 L. J. (M. C.) 60.

(*e*) Russ. Cr. 59.

(*f*) *Reg. v. Gaylor*, 1 Dears & B. C. C. 288 ; see also *Reg. v. Smith*, 2 Cox 233, per Parke, B.

(*g*) Russ. Cr. 59, n. ; see *Rex v. Greenacre*, 8 C. & P. 35.

(*h*) *Rex v. Gordon*, 1 Leach, 515, Arch. Cr. Pldg. 11.

(*i*) *Reg. v. Fallon*, L. & C. 217 ; 32 L. J. (M. C.) 66.

sumed authority. (a) The owner of a shop is liable for any unlawful act done therein in his absence by a clerk or assistant in the ordinary course of business, for *prima facie* it would be his act; but it would seem that if the act was wholly unauthorized by him, and out of the usual course of business, he might escape personal responsibility. (b) But the agent is also liable for an unlawful act, although he may have the express or implied authority of his principal for its commission. (c) And a party who maintains a public nuisance as the agent of another, is a principal in the misdemeanor, and cannot justify on the ground of his agency. (d) It seems there is a great distinction between the authority or procurement which will render a man liable civilly and that which will render him liable criminally. In the former, the authority must be strictly pursued; but, in the latter, the principal may be criminally liable, though the agent deviate widely from his authority. (e) Thus the owner of works carried on for his profit by his agents is liable to be indicted for a public nuisance caused by acts of his workmen in carrying on the works, though done by them without his knowledge, and contrary to his general orders. (f)

So, in a prosecution for a penalty in selling liquor without licence, proof that the sale was made by a person in the defendant's shop, in his absence, and without shewing any general or special employment of such person by the defendant, in the sale of liquors is sufficient *prima facie* evidence against him. (g) So, the proprietor

(a) *Reg. v. King*, 20 U. C. C. P. 248, per *Hagarty*, J.; see also *Atty. Genl. v. Siddon*, 1 Tyr. 47; *Atty. Genl. v. Riddle*, 2 C. & J. 498.

(b) *Ib.*

(c) *Reg. v. Brewster*, 8 U. C. C. P. 208.

(d) *Ib.*

(e) *Parkes v. Prescott*, L. R. 4, Ex. 182, per *Byles*, J.

(f) *Reg. v. Stephens*, L. R. 1 Q. B. 702, 35 L. J. Q. B. 251.

(g) *Ex parte Parks*, 3 Allen, 237.

of a newspaper was held indictable for a libel published therein, though he took no actual share in the publication, and lived one hundred miles distant from the place of publication, and was confined to his house by illness when the paper complained of appeared. (a) Where the defendant was absent in New York, and his wife, in his absence, had a wild duck in her possession, contrary to the Lower Canada Game Act, 22 Vic., c. 103, and was entrusted by the defendant with the ordinary management of his business in his absence:—*Held* that the defendant was responsible, on the ground that the wife was acting as the agent of the husband, and should be presumed to have his authority for the illegal act complained of; and a conviction of the husband (the defendant), and imposition of a penalty was consequently sustained (b)

Upon information for unlawfully selling beer, under 4 & 5 Wm. 4, c. 85, s. 17, it was proved that the appellant's wife had actually supplied the beer to three persons who had asked the appellant for beer, and to whom he had said, whilst pointing to his wife, "You must ask her":—*Held* that upon this evidence the conviction was right. In this case there was an appeal against the decision of the justices. It was argued that if the wife acted as agent for her husband, they both ought to have been summoned and convicted together. However, the Court gave judgment for the respondent. (c)

It is conceived that the principles involved in the foregoing cases will apply to principals and accessories in felonies. In other words, that the authority or procurement which will in misdemeanors render a man liable as a principal for the act of his agent, will, in felonies, render him liable as an accessory before the fact; for it

(a) *Ib.* 241, per Carter, C. J.; *Rex v. Gutch*, M. & M. 433.  
(b) *Reg. v. Donaghue*, 5 L. C. J. 104.  
(c) *Reg. v. Smith*, 5 U. C. L. J. 142.

is a principle of law that he who procures a felony to be done is a felon. (a)

The procurement may be personal, or through the intervention of a third person. (b) It may also be direct by hire, counsel, command, or conspiracy; or, indirect, by evincing an express liking, approbation, or assent to another's felonious design of committing a felony. (c) The procurement must be continuing; for if the procurer of a felony repent, and, before the felony is committed, actually countermand his order, and the principal, notwithstanding, commit the felony, the original contriver will not be an accessory. (d) So, if the accessory order or advise one crime, and the principal intentionally commit another, the accessory will not be answerable. (e) But it is clear that the accessory is liable for all that ensues upon the execution of the unlawful act commanded. (f) A wife is not punishable as accessory for receiving her husband although she knew him to have committed a felony (g); for she is presumed to act under his coercion. But no other relation of persons can excuse the wilful receipt or assistance of felons. (h)

To constitute the offence of accessory after the fact, it is necessary that the accessory have notice, direct or implied, at the time he assists or comforts the felon, that he had committed a felony; and it is also necessary that the felony be complete at the time the assistance is given. (i)

As to felonies created by statute, if an Act of Parlia-

(a) Russ. Cr. 59.

(b) *Reg. v. Earl of Somerset*, 19 st. tr. 804; *Reg. v. Cooper*, 5 C. & P. 535; Arch. Cr. Pldg. 11.

(c) *Ib.*

(d) *Ib.* 11.

(e) *Ib.* 12.

(f) *Ib.* 12.

(g) *Reg. v. Manning*, 2 C. & K. 903 n.; Arch. Cr. Pldg. 14.

(h) *Ib.* 14.

(i) *Ib.* 15.

ment ordain an offence to be felony, though it mention nothing of accessories before and after the fact, yet virtually and consequentially those that counsel or command the offence, are accessories before the fact, and those who knowingly receive the offenders are accessories after. (a) It is a maxim that *accessorius sequitur naturam sui principalis*, and, therefore, an accessory cannot be guilty of a higher crime than his principal. (b)

An accessory is, in some cases, relieved from responsibility with his principal, when the latter does not act in pursuance of his authority and instructions. If the principal totally and substantially varies from the terms of the instigation; if, being solicited to commit a felony of one kind, he wilfully and knowingly commit a felony of another, he will stand single in that offence, and the person soliciting will not be involved in his guilt. But if the principal complies in substance with the instigation of the accessory, varying only in circumstances of time or place, or in the manner of execution, the accessory will be involved in his guilt; and, even when the principal goes beyond the terms of the solicitation, yet, if in the event the felony committed was a probable consequence of what was ordered or advised, the person giving such orders or advice will be an accessory to that felony. (c)

The 31 Vic. c. 72, makes provision for the trial of accessories before and after the fact. This statute alters the old rule by which an accessory could not be brought to trial until the guilt of his principal had been legally ascertained by conviction. By this act, accessories before the fact are triable in all respects as principal felons; and every principal in the second degree is punishable

(a) Russ. Cr. 61.

(b) *Ib.*

(c) Russ. Cr. 62.



in the same manner as the principal in the first degree is punishable.

By s. 8, in the case of a felony wholly committed within Canada, the offence of any person who is an accessory either before or after the fact, to such felony, may be dealt with, enquired of, tried, determined, and punished by any court which has jurisdiction to try the principal felony, or any felonies committed in any district, county, or place in which the act by reason whereof such person shall have become such accessory has been committed.

## CHAPTER III.

OFFENCES PRINCIPALLY AFFECTING THE GOVERNMENT, THE  
PUBLIC PEACE, OR THE PUBLIC RIGHTS.

*Coinage Offences.*—These offences are now regulated by the 32 & 33 Vic., c. 18. A prisoner was indicted under the analogous English section of s. 24 of this Act, for “knowingly and without lawful excuse feloniously” having in his possession a die impressed with the resemblance of the sides of a sovereign. The prisoner ordered dies impressed with the resemblance of the sides of a sovereign of the maker. The maker gave information to the police, who communicated with the authorities of the mint. The latter, through the police, gave the maker permission to give them to the prisoner. He did so, and they were found in the prisoner’s possession:—*Held*, first, that it was necessary in the indictment to negative lawful authority or excuse, notwithstanding that the burden of proof lay upon the accused; secondly, that the word “excuse” includes “authority,” and, therefore, the indictment was good; thirdly, that there was no evidence to go to the jury of lawful authority or excuse, for the prisoner was only allowed to carry out his original intention, whatever that might have been, and no authority was given him to have the dies in his possession; fourthly, that the prisoner, being knowingly in possession of the dies, had sufficient guilty knowledge to constitute felony, whatever his intention as to their use might be, for there was nothing in the act to make the intent any part of the offence. (a) The words as to the

(a) *Reg. v. Harvey*, L. R. 1 C. C. R. 284.

proof being on the accused, only alter the rules of evidence, and not the rule as to the description of the offence in the indictment. (a)

The 32 & 33 Vic., c. 29, s. 26, applies to a trial on an indictment under s. 12 of the Coinage Act for feloniously having in possession counterfeit coin after a previous conviction for uttering counterfeit coin; and, therefore, the previous conviction cannot be proved until the jury find the prisoner guilty of the subsequent offence. (b) Where coin was counterfeited to resemble smooth worn shillings then in circulation, without any impression whatever upon them, it was held to be a sufficient counterfeiting. (c) By the old law, the counterfeit coin must have appeared to have that degree of resemblance to the real coin that it would likely be received as the coin for which it was intended to pass by persons using the caution customary in taking money; and the coin must have been in a complete and perfect state, ready for circulation. (d) Now, however, by the 32 & 33 Vic., c. 18, s. 32, the offence shall be deemed complete although the coin was not in a fit state to be uttered, or the counterfeiting thereof was not finished or perfected. By s. 30 any credible witness may prove the coin to be false or counterfeit. (e) The Imp. Act 16 & 17 Vic., c. 48, is not in force here. (f) But the Imp. Stat. 16 & 17 Vic., c. 102, respecting gold, silver, and copper coin, applies to this country. (h)

The defendants were indicted under s. 18, of the Con. Stat. Can. c. 90, for having in their custody and posses-

(a) *Ib.* 288, per Bovill, C. J.

(b) *Reg. v. Martin*, L. R. 1 C. C. R. 214, 39 L. J. (M. C.) 31; *Reg. v. Goodwin*, 10 Cox, 534 overruled.

(c) *Reg. v. Wilson Leach*, 285; *Reg. v. Welsh*, *ib.* 364; Arch. Cr. Pldg. 745.

(d) *Reg. v. Varley*, 2 W. Bl. 682; *Reg. v. Harris*, 1 Leach, 165; Arch. Cr. Pldg. 745.

(e) See also s. 31.

(f) See 32 & 33 Vic., c. 18, s. 36.

(g) *Warner v. Tyson*, 2 L. C. J. 105.

sion counterfeit foreign coin, and dies and materials used for making the same. The recital in the indictment alleged "that in a certain foreign state, to wit, the United States of America, there was before and at the time of the committing of the offence hereinafter mentioned, a certain silver coin, commonly called and known as half dollar, struck under the authority of the Government of the said foreign state, and then actually current in the country of the said foreign state, although *not current by law in the Province of Ontario*." And in the body of the indictment the coin was described as follows:—"Each piece thereof resembling a piece of the current coin of the said United States of America, made and coined under the authority of the said United States, of the value therein of fifty cents each, and called therein half a dollar, and then *actually current* in the said United States of America, and also five dies, etc., . . . used, constructed, devised, and adapted and designed for the purpose of counterfeiting and imitating the current silver coin of the United States of America, made and coined under the authority of the Government of the said foreign state, and then actually current in the country of the said foreign state, of the value, etc." The defendants demurred to the indictment on the ground that the offence created by the statute under which the indictment was framed, is the having in possession coin counterfeited to resemble, or dies, etc., for the purpose of imitating any foreign gold or silver coin described in the 16th section; but, in this case, the coin was not alleged to have been either gold or silver, nor was it alleged that it was not current in this Province. The Court held it quite clear that the offence created by the Statute is the having in possession counterfeit coin resembling some of the gold or silver coins referred to in the 16th section of the Act;

that the recital did not on examination help the subsequent part of the indictment; and that to bring the offence within the Statute, it was necessary to allege that the coin was not current by law in this Province, and the indictment was consequently bad. But as to the dies, it was held that this latter allegation was not essential, as the intention of the Legislature, in using these words in the Statute, was to indicate that the having possession of such dies, etc., would be an offence, whether the foreign coins they were designed to imitate were coins current or not in the Province. The indictment was quashed for insufficiency. (a) It is conceived this case will apply to an indictment under s. 22 of the present Act, and that such indictment must contain allegations shewing the coin to be that described in sections 18, 19, 20, and 21 of the Act.

*Foreign Enlistment Offences.*—The 33 & 34 Vic., c. 90, is now the governing enactment on this subject. It extends to the whole Dominion of Canada, including the adjacent territorial waters. (b) This statute is highly penal in its character. (c) It, however, strengthens the hands of the Government, and enables it to fulfil more easily than heretofore that particular class of international obligations which may arise out of the conduct of Her Majesty's subjects towards belligerent foreign States with whom Her Majesty is at peace.

It should be so construed as, on the one hand, to give, if possible, due and full execution to its main purpose, and, on the other hand, not to strain its provisions, so as to fetter the private commerce of Her Majesty's subjects beyond the express limits which the statute, for

(a) *Reg. v. Tierney*, 29 U. C. Q. B. 181.

(b) See s. 2.

(c) *The Gauntlet*, L. R. 3 Ad. & Ec. 388, per Sir R. Phillimore.

the general interests of the public weal, has prescribed. (a)

The 59 Geo. 3, c. 69, was in force here until the passing of the former statute, and the local enactment, 28 Vic., c. 2, was passed in aid of it, though any provisions of the local statute in conflict with the Imperial Act would not prevail against the latter. (b) The local enactment will now be void in so far as it is repugnant to the Imp. 33 & 34 Vic., c. 90, but no farther. (c)

The decisions under the old Act are produced here, although the writer is not prepared to pronounce that they are all applicable to the present statute.

A warrant of commitment, issued under the 59 Geo. 3, c. 69, is sufficiently certain if it charges the prisoner with attempting *or* endeavouring to hire, retain, engage, *or* prevail on to enlist as a soldier, in the land *or* sea service, for, *or* under, *or* in aid of Abraham Lincoln, President of the United States of America, and in the service of the Federal States of America. The foregoing is also a sufficient description of the foreign power in the warrant; the power being one whose existence the Court is bound to notice judicially, and the words relating to the Federal States being rejected as surplusage. In such a warrant, it is not necessary to allege that the accused is a British subject, the law presuming him to be such until the contrary appears. It is also unnecessary in the warrant to negative a license from Her Majesty the Queen to do the act or acts concerning which the complaint is laid. (d) A direction to the gaoler to keep the prisoner in the common gaol, "until he shall thence be discharged by due course of law, *or* good and sufficient sureties be received for his appearance," is sufficient—the latter

(a) *The International L. R.* 3 Ad. & Ec. 332, per Sir R. Phillimore.

(b) *Reg. v. Sherman*, 17 U. C. C. P. 66; *Reg. v. Schram*, 14 U. C. C. P. 318.

(c) See s. 2; see also Imp. Stat. 28 & 29 Vic. c. 63, s. 2.

(d) *Re John Smith*, 10 U. C. L. J. 247.

words being read as surplusage, or being read as good for the Magistrates having committed the prisoner for want of bail, it would be in the discretion of the Magistrates or Court ordering bail to fix the amount.

"I," in the text of a warrant, may be read as "I and I," so as to read "given under my and my" hand and seal, etc., it being presumed that both Magistrates use one and the same seal. (a) A warrant of commitment reciting that Thaddeus K. Clarke "was this day charged (not saying upon oath) before us," and without shewing any examination by the Magistrates, upon oath or otherwise, into the nature of the offence, and commanding the constables or peace officers of the County of Welland to take the said Thaddeus K. Clarke into custody, was held sufficient. (b) A warrant committing the prisoner "until *discharged* by due course of law," sufficiently complies with the Statute, which provides for a commitment until *delivered* by due course of law. A warrant executed by two parties, and concluding "given under our hand and seal," is sufficient. (c) A warrant of commitment, reciting that F. M. was charged, on the oath of J. W., "for that he (F. M.) was this day charged with enlisting men for the United States army, offering them \$350 each as bounty," without charging any offence with certainty; without stating that the men enlisted were subjects of Her Majesty, and without shewing that J. W. was unauthorized by license of Her Majesty to enlist, was held bad. (d)

The seventh section of this Act, for prevention of enlisting into foreign service, or the fitting out or equipping, in Her Majesty's dominions, vessels for warlike purposes,

(a) *Re John Smith*, 10 U. C. L. J. 247.

(b) *Re Clarke*, 10 U. C. L. J. 331.

(c) *Ib.*; see also *Re John Smith*, 10 U. C. L. J. 247.

(d) *Re Martin*, 3 U. C. P. R. 298.

provides, (1) That such ship or vessel must be acting without leave or license of the Sovereign of this country. (2) That she must be equipped, furnished, fitted out, or armed, or there must be a procuring, or an attempt or endeavour to equip, furnish, fit out, or arm the ship. (3) That such equipment, furnishing, fitting out, or arming, must be done with the intent or in order that the ship or vessel shall be employed in the service of some Foreign Prince, State, or Potentate, or of any Foreign Colony, Province, or part of any Province or People, or of any person or persons exercising, or assuming to exercise, any powers of Government in or over any Foreign State, Colony, Province, or part of any Province or People." (4) That there must be an intent to employ the ship or vessel either as a transport or store ship, or with intent to cruise or commit hostilities against any Prince, State, or Potentate, or against the subjects or citizens of such Prince, etc., or the persons exercising, or assuming to exercise, the powers of Government in any Colony, Province, or part of any Province or Country, or against the inhabitants of any Foreign Colony, Province, or part of any Province or Country. (5) That such Foreign Prince, State, or Potentate, etc., is one with whom Her Majesty should not be at war. The 3rd part of the section is in the alternative, and it is not necessary that the vessel should be acting in the service of "*any person or persons exercising, or assuming to exercise, any powers of Government in or over any Foreign State, Colony, Province, or part of any Province or People,*" if the vessel is "employed in the service of any Foreign State or People, or part of any Province or People." (a) *Semble* also, it is sufficient if the facts bring the case within either branch of the alternative. (b)

(a) *Reg. v. Carlin*, "*The Salvador*," L. R. 3 P. C. App. 218.

(b) *Ib.*



A commitment under the 28 Vic., c. 2, stating the offence as follows:—"For that he on, etc., at, etc., did attempt to procure A. B. to serve in a warlike or military operation, in the service of the Government of the United States of America, omitting the words "*as an officer, soldier, sailor, etc.*," is bad. (a)

A judgment for too little is as bad as a judgment for too much, and a condemnation to pay \$100 and costs—the Statute imposing \$200 and costs—is bad. (b) So a commitment for the penalty and costs, not stating, in the body of the commitment, or a recital in it, the amount of costs, is bad. (c) A *quære* is added to this case, whether the jurisdiction conferred by the 28 Vic., c. 2, is a general or local one. But a warrant of commitment, on a conviction had before a Police Magistrate for the Town of Chatham, in Ontario, under the 28 Vic., c. 2, averring that, on a day named, "at the Town of Chatham, in said county, he, the said Andrew Smith, did attempt to procure A. B. to enlist to serve as a soldier in the army of the United States of America, contrary to the Statute of Canada in such case made and provided," and then proceeding, "and whereas the said Andrew Smith was duly convicted of the said offence before me, the said Police Magistrate, and condemned," sufficiently shews jurisdiction. (d) A direction to take the prisoner "to the common gaol at Chatham," the warrant being addressed "to the constables, etc., in the County of Kent, and to the keeper of the common gaol at Chatham, in the said county," is sufficient. (e) A warrant, as above set out, sufficiently contains an adjudication as to the offence, though by way of recital. The words "to enlist to

(a) *Re Bright*, 1 U. C. L. J. N. S. 240.

(b) *Ib.*; *Hex v. Solomons*, 1 T. R. 249; *Whitehead, v. Reg.* 7 Q. B. 582.

(c) *Re Bright, supra*; *Hex v. Hall*, Cowp. 60.

(d) *Re Andrew Smith*, 1 U. C. L. J. N. S. 241.

(e) *Ib.*

serve" do not shew a double offence, so as to make a warrant of commitment bad on that ground. The offence created by the Statute is sufficiently described in a warrant as above set out, and such a warrant is not bad as to duration or nature of imprisonment.

The commitment for the further time beyond six months should be at hard labour. (a) It was also held, in this case, that the amount of costs was sufficiently fixed in the warrant of commitment, being, in addition to \$4.50 for costs, all costs and charges of commitment, and conveying him, the said Andrew Smith, to the said common gaol, amounting to the further sum of \$1. The Statute inflicts a penalty, "with costs," and in such case the costs of conveying the defendant to prison may be lawfully added. The Statute was intended to allow both fine and imprisonment, or either, and it is not compulsory to award both. So there is power to commit for non-payment of costs. (b)

During the late war between the North German Confederation and France, a Prussian merchant vessel was captured in the English Channel, as prize of war, by a ship in the service of the Government of France. A prize crew, under the command of an officer in the French naval service, was put on board the prize. Afterwards, the prize was driven, by stress of weather, to the Downs; and on the 24th of November, by order of an Admiral in the French naval service, she anchored off Deal, within three marine miles of the shore. On the 26th of November, the Collector of Customs at Deal told the French Consul there that it was time the prize left British waters. The French Consul, having found the *Gauntlet*, a British steam tug, by accident, at anchor

(a) *Re Andrew Smith*, 1 U. C. L. J. N. S. 241.

(b) *Ib.*

in the Downs, the steam tug, in pursuance of an agreement made between her master and the officer in command of the prize, and under the direction of such officer, towed the prize to Dunkirk roads, for the ordinary towage remuneration, which was afterwards paid by the French Consul-General in London. At the time the agreement was made, the master, who was one of the owners of the steam tug, had reasonable cause to believe that the prize was a prize of war, captured by the French. In a suit for condemnation of the steam tug, it was held that no offence against the Act had been committed. (a) *Seem*, the steam tug was not employed in the military or naval service of France. (b)

It would seem that a ship employed in the service of a foreign belligerent State, to lay down a submarine cable, the main object of which is, and is known to be, the subserving the military operations of the belligerent State, is employed in the military or naval service of that State, within the meaning of the Act. (c) When a cause is instituted against a ship in the Admiralty Court, for an offence under this Act, the Court may, with the consent of the Crown, order the ship to be released on bail. (d)

*Seducing Soldiers or Sailors to Desert.*—The Con. Stat. U. C. C. 100, has been repealed, and the 32 & 33 Vic., c. 25, is now the governing enactment on this subject. The Imp. Mutiny Act did not override the Con. Stat. U. C. c. 100; but the latter was passed in aid of the former, and was in force, notwithstanding the Imp. Mutiny Act. The two Statutes were to be construed as if they had been both Canadian, or both English Acts. (e) The pun-

(a) *The Gauntlet*, L. R. 3 Ad. & Ec. 381.

(b) *Ib.*

(c) *The International L. R.* 3 Ad. & Ec. 321.

(d) *The Gauntlet L. R.* 3 Ad. & Ec. 319.

(e) *Reg. v. Sherman*, 17 U. C. C. P. 168, per J. Wilson, J.; 169, per A. Wilson, J.

ishment by fine and imprisonment imposed by the Provincial Act stood abolished as long as the Mutiny Act was in force, and the imprisonment could in no case exceed six calendar months.

The power of trial by the Court of Oyer and Terminer, under the Con. Stat. U. C. c. 100, was not taken away by the Mutiny Act. It was, therefore, held no objection that a defendant had been tried by a Court of Oyer and Terminer, and sentenced to six months' imprisonment, and a fine of 10s. imposed; for this was merely a nominal compliance with the Statute, and the Court had power to pass the proper judgment, if an improper one had been given. (a)

The 32 & 33 Vic., c. 25, seems to give no power of trial to a Court of Oyer and Terminer, so that the above case will scarcely apply to it. The offender may be convicted in a summary manner, before any two Justices of the Peace, on the evidence of one or more credible witness or witnesses, etc. By s. 5, every offence against the Act is a misdemeanor, and may be prosecuted as such, and nothing in the Act shall be construed to prevent any person being prosecuted, convicted, and punished, under any Act of the Imperial Parliament in force in Canada. (b)

The defendant was indicted under the Con. Stat. U. C. c. 100, s. 2, and convicted of receiving and concealing a deserter from the Royal Navy. The Naval Discipline (Imp.) Act, 29 & 30 Vic., c. 109, s. 25, authorizes a summary conviction before Magistrates for this offence; but the 101st section expressly preserves the power of any Court, of ordinary civil or criminal jurisdiction, with respect to any offence mentioned in the Act punishable by common or statute law:—*Held*, therefore, that the

(a) *Reg. v. Sherman*, *supra*, 166–172; *Daw v. Metro. Board Co.*, 12 C. B. N. S. 161, 8 Jur. N. S. 1040.

(b) See also 34 Vic. c. 32, 33 Vic. c. 19.

defendant could be indicted under the Provincial Act, and that the conviction was right. (a) Where an indictment charged that the defendant did receive, conceal, or assist "one W., a deserter from the navy," the Court inclined to think that this was not sufficiently certain or precise; for although acts which would prove concealment must involve receiving, and still more certainly assisting, yet there might be acts of assistance quite apart from either concealment or receiving. (b) The Mutiny Act of 1867, 30 Vic., c. 13, has no applicability to the above case. The provisions of that Act relate only to soldiers, or to persons in connection with their conduct towards those who come within the meaning of the Act as soldiers. (c)

A warrant of commitment, in which it was charged that the prisoner, on the 20th June, 1864, "and on divers other days and times," at the City of Kingston, did unlawfully attempt to persuade one James Hewitt, a soldier in Her Majesty's service, to desert, was held bad; for it was impossible to say, upon reading the warrant, how many offences he had committed, or how the punishment was awarded to each specific offence. And if the prisoner were brought up again, he would be unable to say whether he had been tried or not, for he could not tell for which attempt he had already been imprisoned:—*Held*, also, that there was no conviction to sustain the warrant of commitment, nor, in fact, any conviction to sustain an imprisonment at all; for if the very words were used in the commitment which were cited in the alleged conviction, the commitment could not be sustained. (d)

When a soldier commits felony, by firing, without

(a) *Reg. v. Patterson*, 27 U. C. Q. B. 142.

(b) *Ib.*

(c) *Ib.* 144, per *Draper*, C. J.

(d) *Re McGuines*, 1 U. C. L. J. N. S. 15.

orders, on a crowd of people, in the streets of a city, such conduct being insubordinate, unsoldier-like, and to the prejudice of good order and military discipline, he must first be held to answer before the constituted tribunals in the colony proceeding under the common law, before a military court, under the Mutiny Act, and the Articles of War can legally take cognizance of the charge. (a)

A volunteer is liable, by 29 & 30 Vic., c. 12, to be tried by a Court Martial for misconduct while present at a parade of his corps, though not actually serving in the ranks at the time. (b)

*Piracy.*—This offence at common law consists in committing those acts of robbery and depredation upon the high seas which, if committed upon land, would have amounted to felony there. (c) It was not felony which was triable by jury at common law, but has been made so by the 28 Hy. 8, c. 15, and 11 & 12 Wm. 3, c. 7. (d) These two Statutes may, perhaps, be treated as in force here, being part of the law of England at the time of its introduction. In Canada, piracy is, in fact, felony committed within the jurisdiction of any Court of Admiralty; for any felony punishable under the laws of Canada, if committed within the jurisdiction of the Admiralty Courts, may be dealt with, enquired of, tried, and determined in the same manner as any other felony committed within that jurisdiction. (e)

The Imp. Stat. 12 & 13 Vic., c. 96, extends to the Dominion, and makes further and better provision for the trial of piracy than is made in and by the two former Statutes, and may, perhaps, to some extent, supersede them. Commissions were required for the trial of offences

(a) *Ex parte McCulloch*, 4 L. C. R. 467.

(b) *Ex parte Rickaby*, 17 L. C. R. 270.

(c) *Rum. Cr.* 144.

(d) *Rum. Cr.* 144.

(e) 32 & 33 Vic., c. 29, s. 136; see also 12 & 13 Vic., c. 96, s. 1.

under the earlier Statutes, but it is conceived that the later enactment is in itself a sufficient authority for the trial of these offences, and that commissions are now unnecessary.

The material enquiry in cases of piracy is as to the jurisdiction of the Admiralty Courts.

The Admiralty jurisdiction of England extends over British vessels, not only when they are sailing on the high seas, but also when they are in the rivers of a foreign territory, at a place below bridges where the tide ebbs and flows, and where great ships go, although the municipal authorities of the foreign country may be entitled to concurrent jurisdiction. And all seamen, whatever their nationality, serving on board British vessels, are amenable to the provisions of British law. (a)

An American citizen, serving on board a British ship, caused the death of another American citizen, serving on board the same ship, under circumstances amounting to manslaughter, the ship at the time being in the river Garonne, within French territory, at a place below bridges, where the tide ebbed and flowed, and great ships went:—*Held* that the ship was within the Admiralty jurisdiction, and that the prisoner was rightly tried and convicted at the Central Criminal Court. (b)

Where, on a trial for maliciously wounding on the high seas, it was stated by three witnesses that the vessel on board which the offence was alleged to have been committed was a British ship, of Shields, and that she was sailing under the British flag, but no proof was given of the register of the vessel, or of the ownership:—*Held* that the Court had jurisdiction over the offence—first, because the evidence was sufficient to prove that the

(a) *Reg. v. Anderson*, L. R. 1 C. C. R. 161, 38 L. J. (M. C.) 12; and see *Reg. v. Lopez*, 1 Dears B. 1 C. C. 525; *Reg. v. Lesley*, 1 Bell, C. C. 220.

(b) *Reg. v. Anderson*, *supra*; and see *Reg. v. Allen*, 1 Mood. C. C. 494.

vessel was a British vessel; secondly, because, even if it had appeared that the vessel was not registered, the Court would still have jurisdiction, as there is nothing in the Merchant Shipping Act to take away that jurisdiction, and also by reason of s. 106 of the latter Act, 1854, which provides that, as regards the punishment of offences committed on board such a ship, she shall be dealt with in the same manner as if she were a recognised British ship. (a)

The prisoner was indicted for stealing three chests of tea from a vessel, which sailed from London, on the high seas, when the vessel was lying off Wampa, in China. The vessel lay twenty or thirty miles from the sea. No evidence was given of the flowing of the tide, or otherwise, where the vessel lay:—*Held*, on a case reserved, that the offence was within the Admiralty jurisdiction. (b) Where the sea flows in between two points of land in England, a straight imaginary line being drawn from one point to the other, the Courts of common law have jurisdiction of all offences committed within that line, though it is said the Admiralty has concurrent jurisdiction within such line. (c)

The great inland lakes of Canada are within the Admiralty jurisdiction, and by the Imp. Act 12 & 13 Vic., c. 93, there is authority in our Courts and Magistrates to take cognizance of an offence committed in the lakes, although in American waters, in the same manner as if committed on the high seas. The power may be exercised by all Magistrates in the colony, as if the offence had been committed in the waters within the limits of the colony, and within the limits of the local jurisdiction

(a) *Reg. v. Sebery*, L. R. 1 C. C. R. 284, 39 L. J. (M. C.) 133.

(b) *Rex v. Allen*, 7 C. & P. 664; *Reg. v. Sharpe*, 5 U. C. P. R. 138, per A. Wilson, J.

(c) *Ib.* 139, per A. Wilson, J.; *Rex v. Bruce*, R. & R. 243.



of the Courts of criminal justice of the colony; (a) for there is nothing in the Statute to give any particular functional jurisdiction, or to make the offence of a local nature, and, therefore, any Magistrate in the Province may act. (b) If a robbery be committed on lakes, harbours, ports, etc., in foreign countries, the Court of Admiralty indisputably has jurisdiction. (c)

A British Court has no jurisdiction to punish a foreigner for an offence committed on the high seas, in a foreign ship, against a British subject. (d) The 32 & 33 Vic., c. 20, s. 9, makes provision for the trial in Canada of offences amounting to murder or manslaughter committed upon the sea. (e)

*Customs and Excise Offences.*—These offences are now regulated by various Statutes. (f) The 31 Vic., c. 6, s. 80, provides that persons committing certain offences, with regard to warehoused goods, shall incur the *penalties* imposed on persons for smuggling. By s. 75 of the same Act, smuggling is made a misdemeanor, punishable by a penalty not exceeding \$200, or by *imprisonment* for a term not exceeding one year, or by *both*. An indictment will not lie under s. 80 for the misdemeanor created by s. 75, for the 80th section does not declare that the parties offending, etc., shall be deemed guilty of the misdemeanor created by the 75th, and the clause cannot be extended to the creation of a new crime by implication. (g) It is unnecessary to allege, in the indictment for offences against this Act, that the warehouse therein referred to is a Customs warehouse, or one duly appointed and

(a) *Reg. v. Sharpe*, 5 U. C. P. R. 135.

(b) *Ib.* 140, per *Wilson*, J.

(c) *Ib.* 139, per *Wilson*, J.

(d) *Reg. v. Kinsman*, 1 James, 62.

(e) See also c. 29, s. 9.

(f) See as to customs 31 Vic., cs. 5, 6, 7, 43 & 44; also 33 Vic. c. 9, and 34 Vic. cs. 10 and 11.

(g) *Reg. v. Bathgate*, 13 L. C. J. 299.

established according to the provisions of law; for the meaning of the word "warehouse" is clearly defined by the Customs Act, and it would be matter of proof as to whether the building alluded to comes within that definition or not. Nor is it necessary to allege that the goods had been marked and stamped in accordance with the requirements of the Act, for the security of the revenue of Canada, nor that the goods had previously been duly entered for warehousing, in accordance with the provisions of law, nor to allege by whom the goods were kept in the warehouse, for not one of these statements is required by the Statute; and, moreover, in official matters, all things are presumed to have been properly done. An allegation that the goods were fraudulently removed implies sufficiently that they were not legally cleared from, etc. (a)

On a Statute somewhat similar to the 31 Vic., c. 6, s. 91 (using, however, the words "information on oath shall be given"), it was held that, to justify the breaking open of a building, there should have been, first, a written information on oath; and, second, the actual presence of the Justice at the breaking, so that the parties may understand the demand for admittance comes from the Justice, by virtue of his legal authority, and magisterial character. (b)

The grounds for holding a written information necessary were: the object of the information being to authorize the forcible breaking of a man's house, something is required to protect the Justice if sued for the entry jointly with the officer; and the person, whose house is broken into, is entitled to know distinctly what the information was on which the Justice acted; and proper evidence is

(a) *Reg. v. Bathgate, supra.*

(b) *Reg. v. Walsh, 2 Allen, 387.*

required of these, and also to shew that the information is authorized by the Act. (a)

Not opening a door, after a proper demand, is a sufficient denial within the Act. If the breaking open is unlawful, and the officer is concerned therein, he cannot justify the seizure of smuggled goods found within the building; but if a party, not concerned in the unlawful breaking, seized the goods, the case might be different. *Seemle* that an order to enter given to a police officer, present with the revenue officer, would be sufficient, and that he would be presumed to be acting in aid. (b) If the door be closed, and admission denied, then the Act clearly intends that the Justice should be the person to demand admittance, and to declare the purpose for which the entry is demanded. Possibly he might do this by the mouth of the officer, but it should be done in such a way as to be well understood as coming from the Justice, by virtue of his legal authority, and magisterial character. (c)

An indictment for smuggling, under the (N. B.) Rev. Stat., c. 29, s. 1, charged, in the several counts, (1) that the defendant unlawfully landed alcohol, subject to duty, and thereby smuggled the same; (2) that defendant unlawfully landed alcohol, subject to duty, without reporting to the Treasurer, and thereby smuggled, etc.; (3) that the defendant landed the alcohol without a permit, and thereby smuggled; (4) that the defendant landed alcohol without paying the duties:—*Held* (1) that the indictment was insufficient, as the mere unlawful landing of goods, without alleging any intent to defraud the revenue, did not constitute the offence of smuggling; (2) that the landing of goods, without reporting them to the

(a) *Reg. v. Walsh*, 2 Allen, 387.

(b) *Ib.*

(c) *Ib.* 391, per *Carter*, C. J.

Treasurer, or without obtaining a permit, though it subjected the party to a penalty, did not amount to smuggling; (3) that the mere landing of goods, without a previous payment of duty, is not a breach of the revenue laws, as the duty might be secured as pointed out in the Act; and the fourth count was bad, in not negating the fact that the duties were secured. (a)

The Colonial Legislature has power to impose additional grounds of forfeiture, for breach of the revenue laws, on goods subject to forfeiture, under an Act of the Imperial Parliament. (b)

In the *Atty. Genl. v. Warner*, (c) the question was raised, but not decided, whether an information would lie under the 66th clause of the Imp. Act 8 & 9 Vic., c. 93, where the party informed against was a person shewn not to have transported or harboured the goods of another, but his own goods, smuggled by himself, on his own account.

By this Stat. 8 & 9 Vic., c. 93, gunpowder is prohibited from being imported into the British possessions in America, except from the United Kingdom, or some British possession. Gunpowder coming from a foreign country cannot be proceeded against as a non-enumerated dutiable article under the Provincial Revenue Act, 11 Vic., c. 1, for being imported into the Province, at a place not a port of entry, contrary to the Act 11 Vic., c. 2, s. 21. It is liable to seizure and forfeiture, under the 17th section of that Act, for being landed without entry at the Treasury. (d) Spirits in casks, less than 100 gallons, are liable to forfeiture, under the 11 Vic., c. 67, though the vessel in which they were imported is over 30 tons register. (e)

(a) *Reg. v. Cassidy*, 4 Allen, 623.

(b) *Atty. Genl. and Myers*, 2 Allen, 493.

(c) 7 U. C. Q. B. 399.

(d) *Id.*

(e) *Atty. Genl. v. Walsh*, 2 Allen, 457.

In an information for the condemnation of goods as illegally imported, it is allowable, under a plea that they were not imported *moda et forma*, to shew that the goods were landed through stress of weather. (a)

In an information, at the suit of the Crown, for goods seized at the Custom-House, there must have been a substantive allegation that the goods were imported and brought in in violation of the Custom-House regulations and the omission of the words "against the form of the Statute" was fatal. (b)

So in an information by the Solicitor-General, *pro Regina*, for a forfeiture grounded on the importation of goods into the Province without payment of duties, the omission of the words "against the form of the Statute" was held fatal. (c) The omission of these words is probably cured by the 32 & 33 Vic., c. 29, s. 23.

In an information for a penalty under the Customs Act, 3 & 4 Wm. 4, c. 59, for knowingly harbouring smuggled goods, the *scienter* is a proper question for the jury; and in such information, the particular illegal act, as that the goods were imported without payment of duties, etc., should be specified, and the information should expressly shew that the offence charged to have been committed was contrary to the form of the Statute, and saying merely that the Statute gives a right to the penalty is not enough. (d)

If a quantity of smuggled goods are purchased at one time, but seizures of them are made at different times, only one penalty for harbouring them can be recovered. (e)

An entry at the Custom House declared that the packages contained articles not subject to duty, but some

(a) *Atty. Genl. v. Spafford Draper*, 333.

(b) *Solr. Genl. v. Darling*, 2 L. C. R. 20.

(c) *Solr. Genl. v. Carter*, 1 L. C. R. 20.

(d) *Reg. v. Aumond*, 2 U. C. Q. B. 166.

(e) *Ib.*

of them contained contraband goods:—*Held* that it was but one entry, and that being false as to some of the packages, the goods were not duly entered, and the whole were forfeited under the (N. B.) 1 Rev. Stat., c. 27, s. 10. (a)

A revenue inspector, suing in the Queen's name for penalties under the 14 & 15 Vic., c. 100, is not liable for costs, because he comes within the ordinary common law rule, exempting the Crown from costs. (b)

Under the (N. B.) 18 Vic., c. 36, a warrant to search for liquors in a dwelling-house in which a family resides, and no part of which is used as a shop or place for the sale of liquors, cannot issue, without the oath of three persons, stating their reasons for believing that liquors have been sold, or are kept in such dwelling-house for illegal sale. (c) Nor can such warrant issue without such information to search for liquors in a dwelling-house in which a family resides, though there may be a shop or place in the house for the sale of liquors. (d) Proof that the house in which the liquor was seized was kept as an hotel will not justify a search warrant on the information of one person, as it cannot be judicially noticed that an hotel is a place for the sale of liquor. (e) Where liquor, legally imported, is condemned, under section 15, as being kept for illegal sale, the Justice has no power to order the casks containing the liquor to be destroyed. (f)

The *onus* of proving that the liquor was not intended for sale, in order to save it from forfeiture, under section 15, is thrown on the owner; but to subject him to the penalty, under section 16, it must be proved that he intended the liquor for illegal sale.

(a) *Reg. v. Southward*, 3 Allen, 367.

(b) *Ex parte Hogue*, 3 L. C. R. 287.

(c) *Reg. v. Salter*, 3 Allen, 321.

(d) *Ex parte Caldwell*, 3 Allen, 393.

(e) *Reg. v. Salter*, *supra*, 321.

(f) *Ib.*

An information under the Act need not state that the informer is a reputable person. (a)

An order made under this Act, by a Justice of the Peace, to condemn liquors, with the packages in which they are contained, is indivisible; and if bad as to the packages, cannot stand good as to the rest, though the liquor is liable to forfeiture. (b)

In a proceeding under this Act, the person summoned to shew why the liquor seized should not be forfeited, has a right, before going into his proof, to be informed by the Justice who the complainant is, and what he has sworn to in the information. (c)

An information, stating that intoxicating liquors are kept for illegal sale by A. "in his house or shop, or on the premises where he now dwells, in the County of C." is not sufficiently certain to authorize the search of a dwelling-house under this Act. And such an information will not justify a search warrant, stating that there was a place in the dwelling-house for the sale of liquor. (d)

A conviction under this Act must follow the form prescribed in the schedule, and not the form in the Summary Conviction Act. The form of conviction given stated that, in default of payment of the fine and costs of prosecution, the defendant should be imprisoned for three months, "unless the said several sums be sooner paid":—*Held* that a conviction under the Act, which, in addition to these sums, required the costs of distress and commitment to be paid, was bad. (e)

*Excise.*—An indictment, under 31 Vic., c. 8, s. 143, for breaking a lock, etc., after other statements, alleged:—in which said warehouse certain goods for and in respect of

(a) *Reg. v. Salter*, 3 Allen, 321.  
(b) *Ex parte Breeze*, 3 Allen, 390.  
(c) *Ex parte Sterenson*, 3 Allen, 391.  
(d) *Ex parte Caldwell*, 3 Allen, 393.  
(e) *Ex parte Breeze*, 3 Allen, 395.

which a certain duty of excise was then and there by law imposed, were then and there kept and secured, without the knowledge and consent of the collector of inland revenue:—*Held* that the redundant expression, “were then and there kept and secured,” made the words which form the gist of the offence, “without the knowledge and consent of the collector of inland revenue,” apply apparently not to the opening of the lock, but to the keeping and securing of certain goods in the warehouse, and was therefore bad. (a) The indictment need not shew the description of goods, nor that they are subject to excise, nor by whom the goods were kept and secured, nor that the goods were retained in any warehouse, under the supervision of any officer of Inland Revenue, nor that defendant opened a lock attached to a warehouse in which goods were so retained, nor that the excise duty was then and there unpaid, for all these allegations are mere surplusage. (b)

It has been held that, in a prosecution for selling liquor without license, the information need not be under oath, for the Act respecting tavern-keepers (c) gives all the forms that are to be followed in such cases, and the Con. Stat. Can., c. 103, s. 24, does not apply to the case. (d) In another case, the Court refused to grant a mandamus to compel two Justices of the Peace to issue execution upon a conviction under 6 Wm. 4, c. 4, s. 2, for selling spirituous liquors without license, the conviction having been founded on the written statement of the informer, and the oath of one other witness, there being a doubt under the Statute whether the information ought not also to be on oath. (e)

(a) *Reg. v. Bathgate*, 13 L. C. J. 303.

(b) *Ib.*; see also as to excise 31 Vic., ca. 49 and 50; 33 Vic., c. 9; and 34 Vic., c. 15.

(c) Con. Stat. L. C., c. 6.

(d) *Ex parte Cousine*, 7 L. C. J. 112.

(e) *Reg. v. McConnell*, 6 U. C. Q. B. O. S. 629.



Now, in Ontario, prosecutions for selling liquor without license are to be conducted according to the practice and procedure and after the forms contained in the 32 & 33 Vic., c. 31. (a) Under s. 24 of the 32 & 33 Vic., c. 31, all informations may be without oath or affirmation as to the truth thereof, unless some particular Act or law otherwise requires.

A deputy revenue inspector may validly sign a plaint or information for selling liquor without a license. (b) The prosecutor is not bound to prove that the defendant had no license, as he is not called on to prove a negative. (c)

Under the 29 & 30 Vic., c. 51, ss. 249 and 254, a person holding a shop license for the sale of liquors was punishable for an offence against law, under the latter section, for selling liquors at his shop in quantities less than a quart. (d)

Where the jurisdiction of the Justices appeared on the conviction, the offence being alleged to have happened at the Town of Moncton, where it was heard and tried, and the conviction being in the form prescribed by the (N.B.) Rev. Stat., c. 138, and the place of sale spoken of at the trial appearing to be known to all parties, and no objection having been then made that it was not within the jurisdiction of the Justices:—*Held* that the jurisdiction sufficiently appeared, though it was not shewn by positive evidence that the offence was committed within the limits of the Town of Moncton. (e)

A conviction under 28 Vic., c. 22, for selling liquor without a license, omitted to state that defendant had been

(a) See (Ont.) 32 Vic., c. 32, s. 25.

(b) *Reynolds and Durnford*, 7 L. C. J. 228.

(c) *Ex parte Parks*, 3 Allen, 237; see post evid; *Re Barrett*, 28 U. C. Q. B. 561, per A. Wilson, J.; *Rex v. Turner*, 5 M. & S. 206.

(d) *Reg. v. Faulkner*, 26 U. C. Q. B. 529, 3 L. C. G. 185.

(e) *Ex parte Dunlop* 3 Allen, 281.

convicted of selling "by retail":—*Held*, on appeal to the Quarter Sessions, that the offence was not sufficiently stated in the conviction, and it was accordingly quashed:—*Held*, also, that the proper time for applying to amend the conviction, under the 29 & 30 Vic., c. 50, was at the time it was made, and that it could not afterwards be amended under the provisions of that Act. (a)

In an appeal from a conviction for selling liquor contrary to c. 22 of the (N.S.) Rev. Stat., the Court will allow the original summons to be amended. (b)

A conviction for that one H., on, etc., "did keep his bar-room open, and allow parties to frequent and remain in the same, contrary to law," was held clearly bad, as shewing no offence. So a conviction for that the said H. "did sell wine, beer, and other spirituous or fermented liquors, to wit, one glass of whisky, contrary to law," was held bad for uncertainty, as not shewing whether the offence was for selling without license, or during illegal hours. (c)

In a conviction under the (N. B.) 15 Vic., c. 51, which prohibits the sale of intoxicating liquors, except beer, ale, porter, and cider, it is insufficient to allege that the sale was "contrary to the Act of Assembly." The conviction should negative the exceptions in the Act. (d)

The action of debt for the recovery of penalties given by this Act is a cumulative remedy, and does not take away the mode of proceeding prescribed by the Summary Conviction Act, 12 Vic., c. 31. (e)

A conviction for selling liquors without a license is bad if it do not specify the day on which the offence was committed. (f)

(a) *Bird v. Brian*, 3 L. C. G. 60; see 32 and 33 Vic. c. 31, s. 68.

(b) *Taylor v. Marshall*, 2 Thomson. 10.

(c) *Reg. v. Hoggard*, 30 U. C. Q. B. 152.

(d) *Ex parte Clifford*, 3 Allen 16.

(e) *Ex parte Hartt*, 3 Allen, 122.

(f) *Reg. v. French*, 2 Kerr, 121.

It would seem that, after a first conviction has been returned to the Sessions, and filed, the Justices, if they think it defective, may make out and file a second. (a)

A conviction for selling liquor on a Sunday, in contravention of the (Ont.) 32 Vic., c. 32, s. 23, omitted to state that the liquor was not supplied, upon a requisition, for medicinal purposes; *held* bad, and the conviction was quashed. (b)

In *Reid v. M'Whinnie*, (c) it was held sufficient to state the offence in the conviction as selling "a certain spirituous liquor called whisky," though s. 254 of the 29 & 30 Vic., c. 51, which created the offence, mentioned "intoxicating liquor of any kind," for intoxicating liquor and spirituous liquor were used in the Act as convertible terms, and in the Customs Act, of the same session, whisky was recognized as a spirituous liquor. The offence alleged was selling "a certain quantity, to wit, one pint":—*Held* sufficient, without negating that it was a sale in the original packages, within the exemption in s. 252 of the Act, for it would be judicially noticed that a pint was less than five gallons, or twelve bottles, which the packages must at least have contained. (d)

Where a conviction on its face was dated on the 30th of April, and alleged the sale of liquors on the 12th of April in the same year:—*Held* no objection that the proceedings were not stated to have been begun within the twenty days from the offence, limited by s. 259 of this Act, for the fact sufficiently appeared on the face of the conviction. (e)

Certainty and precision are required in the statement and description of an offence under a penal statute, and

(a) *Wilson v. Graybiel*, 5 U. C. Q. B. 227; *Chaney v. Payne*, 1 Q. B. 712.

(b) *Reg. v. White*, 21 U. C. C. P. 354.

(c) 27 U. C. Q. B. 289.

(d) *Ib.*

(e) *Ib.*

an information charging several offences in the disjunctive is bad, and the defect will not be cured by the confession of the defendant. (a) The charge in a conviction must be certain, and so stated as to be pleadable in the event of a second prosecution for the same offence. (b)

The conviction must be of the offence charged in the information, and not of a different offence, or of several offences in the conjunctive, charged in the disjunctive. (c) Therefore, a conviction adjudging the defendant guilty of the several offences therein enumerated, and condemning him "for his said offences" to but one penalty, is bad. (d) A conviction will lie against a partner alone for selling liquor without license, for all torts are several as well as joint. (e)

The following conviction for selling spirituous liquors by retail, contrary to law—namely, "that A. B., of, etc., merchant and shopkeeper, did, within the space of six calendar months now last past, in the year aforesaid, at, etc., sell and vend a certain quantity of spirituous liquors in less quantity than one quart, to wit, one pint, etc., without license for that purpose previously obtained, contrary to the form of the Statute, in such case made and provided," was held bad in substance, in leaving it doubtful under which of the Stats.—40 Geo 3, c. 4; 6 Wm. 4, c. 2; 6 Geo. 4, c. 4—and for what offence the conviction was made. (f) When a conviction concludes *contra formam statuti*, it should first shew something done which is contrary to the Statute, and the conclusion should follow properly from the premises, otherwise a criminal charge would contain no certainty at all. (g)

(a) *Ex parte Hogue*, 3 L. C. R. 94.

(b) *Reg. v. Hoggard*, 30 U. C. Q. B. 152.

(c) *Ex parte Hogue* 3 L. C. R. 94.

(d) *Ib.*

(e) *Mullins and Bellamere*, 7 L. C. J. 228.

(f) *Wilson v. Grayhiel*, 5 U. C. Q. B. 227.

(g) *Ib.* 229, per *Robinson*, C. J.

A conviction under the 14 & 15 Vic., c 100, for retailing spirituous liquors, and not alleging such sale to have been made "without license," discloses no offence, and cannot be sustained. (a) But where a conviction for selling liquor without license, contrary to the (N. S.) Rev. Stat., c. 22, s. 32, did not state that the sale was "without license" :—*Held* that this was an immaterial fact, and that the conviction substantially stated the nature of the offence, and was sufficient. (b)

In a prosecution for selling liquor without license, it is not necessary to negative the averment that the defendant is not a distiller within the provisions of Con. Stats., L. C. c. 6, s. 1. (c) An allegation that the defendant sold by retail, at one time, fermented liquors in less quantities than three gallons, to wit, three glasses of beer, is sufficient and legal, and such an allegation of an offence committed on a day certain, and "at divers times before and after," does not include several offences, it being conformable to the form of declaration given in the above Statute. (d) Keeping a house of public entertainment is no offence against this Act, unless qualified. (e)

A conviction under 40 Geo. 3, c. 4, for selling liquor without licence was quashed, because the information stated that "the defendant was in the habit of selling spirituous liquors without license," without charging any specific offence, and not shewing time nor place, nor that the liquors were sold by retail, and also because the conviction directed the defendant to pay the costs of the prosecution, without specifying the amount. (f) But it was no objection, under the 29 & 30 Vic., c. 51, s. 254,

(a) *Ex parte Woodhouse*, 3 L. C. R. 94.

(b) *McCully v. McCay*, 3 Cochran, 82.

(c) *Ex parte Moley*, 7 L. C. J., 1.

(d) *Ib.*

(e) *Ex parte Mogul*, 7 L. C. R. 107.

(f) *Rex v. Ferguson*, 3 U. C. Q. B. O. S. 220.

that the costs of conveying the defendant to gaol, in the event of imprisonment, in default of distress were specified. (a)

The quashing of a by-law under which a certificate has been granted, and license issued for the sale of spirituous liquors, does not nullify the license under the (Ont.) 32 Vic., c. 32; and a conviction for selling without license cannot therefore, under these circumstances, be supported. (b)

Under this Statute, a license to sell spirituous liquors, whether by wholesale or retail, is now necessary, either in the case of a tavern or a shop; and in the case of a shop, it must not be consumed on the premises, or sold in quantities less than a quart. Therefore, the sale of a bottle of gin, without license, is contrary to law; and it would seem that even if a license be necessary only on a sale by retail, the sale of a bottle valued at sixty cents would be a sale by retail. (c)

It is not necessary, in a conviction for selling liquor without a license, to mention the Statute under which the conviction took place. Under the 32 Vic., c. 32, it need not appear on the face of the conviction that the prosecution was commenced within twenty days of the commission of the offence. This latter point, however, depends upon the peculiar language of the Act, or rather upon the fact that the section of the Act containing the limitation is entirely distinct from the section creating the offence, and imposing the penalty—the latter being s. 22, and the former s. 25. The rule in such cases is, that the limitation arising under a distinct clause is matter of defence, and need not appear on the face of the conviction. (d)

(a) *Reid v. McWhinnie*, 27 U. C. Q. B. 289.

(b) *Reg. v. Stafford*, 22 U. C. C. P. 177.

(c) *Reg. v. Strachan*, 20 U. C. C. P. 182.

(d) *Reg. v. Strachan*, *supra*; *Wray v. Toke*, 12 Q. B. 492; *Rex v. Woodcock*, 7 E. 146.

Where the conviction is for a fine—as a fine is imposed by s. 22 for the *first* offence—it is not necessary to specify whether the conviction is for the first or second offence, as, from the punishment awarded, the Court would imply the first offence; and as the offence is selling liquor without license, it is not necessary to state to whom the liquor was sold. S. 25 of the Act provides that the Magistrate shall proceed in a summary manner, according to the *practice* and *procedure*, and after the *forms*, contained in c. 103 Con. Stats. of Canada. It was held, therefore, that the Magistrate following that Act, in awarding imprisonment in default of distress and commitment, and conveying to gaol, was not acting illegally, and that it was also sufficient for the conviction to follow the *forms* given by same Statute. (a)

This Statute was intended as a guide to Magistrates, and to prevent failure of justice. A conviction, therefore, is sufficient if it follows the form prescribed by the Statute. (b)

Where the depositions returned to the Court by the convicting Magistrate, under a *Certiorari*, shewed that there was no evidence of a license produced before him, while the affidavits filed, on the application to quash, stated that the party had a license in fact, and produced evidence of it before the Magistrate, who, moreover, himself swore that he believed a license was produced, but it was either not proved, or given in evidence:—*Held* that the return to the *Certiorari* was conclusive, and that the Court could not go behind it. (c)

The informer is a competent witness, as he is expressly made so by the Statute. (d)

(a) *Reg. v. Strachan*, 20 U. C. C. P. 182; *Re Allison*, 10 Ex. 568, per Parke, B.; *Moffat v. Barnard*, 24, U. C. Q. B. 498; *Egginton v. Lichfield*, 5 E. & B. 103.

(b) *Reid v. M'Whinnie*, 27 U. C. Q. B. 289.

(c) *Reg. v. Strachan*, 20 U. C. C. P. 182.

(d) *Ib.*

A conviction under this Statute, alleging that defendant sold spirituous liquors by retail, without license, stating time and place, is sufficient, without specifying kind and quantity, as this is a particular act, and it is enough to describe it in the words of the Legislature. (a) Under the Statute, the owner of a shop is criminally liable for any unlawful act done therein in his absence by clerk or assistant, as, for instance, in this case, for the sale of liquor, without license, by a female attendant. But it would seem, if the act of sale was an isolated one, wholly unauthorized by him, and out of the ordinary course of his business, he would not be liable. (b)

In *Reg. v. Lennox*, (c) a conviction under a by-law of the Commissioners of Police, imposing a fine of \$5 on a person holding a tavern license, for not exhibiting over his door the words "Licensed to sell wine, beer, and other spirituous and fermented liquors," was quashed, a greater fine than \$1 not being authorized by law.

A conviction under Con. Stats., U. C., c. 54, s. 254, which does not negative that the persons to whom the sale is made are travellers, or ordinary boarders, lodging at the place where the liquor is sold, or a requisition for medical purposes, is void. Where the proof must negative the circumstances of exception, the allegations in the instrument of conviction ought to do the same, otherwise the conclusion *contra formam Statuti* will not remedy the defect. (d)

Where a licensed victualler has opened his house on Sunday, within the prohibited hours, for the *bona fide* supply of refreshments to travellers arriving at an adjacent railway station, the mere fact that refreshment has

(a) *Re Donelly*, 20 U. C. C.P. 165.; *Reg. v. King*, 20 U. C. C. P. 246.

(b) *Ib.*; see *ante*, p. 104.

(c) 26 U. C. Q. B. 141.

(d) *Mills and Brown*, 9 U. C. L. J. 246; *Reg. v. Jukes*, 8 T. R. 542.



been supplied to persons residing within a mile of the house, and who did not come by the train, will not justify a conviction under the 11 & 12 Vic., c. 49, s. 1. (a)

A. walked on Sunday to a spa, two and one-half miles distant from his residence, for the purpose of drinking the mineral water there, for the sake of his health, and was supplied with ale at an hotel at the spa, before half past twelve o'clock in the afternoon—this being within the prohibited hours—the Court held that A. was a traveller, within s. 1 of the above Statute. (b)

Upon a complaint against an innkeeper, for keeping an open house on a Sunday before one P.M., contrary to the Statute:—*Held* that, notwithstanding s. 14 of 11 & 12 Vic. c. 43, the complainant was bound to prove affirmatively that the persons supplied by the defendant were not travellers. (c) This rule was also adhered to in two other cases. (d)

Where the defendant held a license to sell beer not to be drunk on the premises, and his servant handed beer in a mug, through an open window of the defendant's premises, to a person who, after paying for it, drank it immediately, standing on the highway, as close as possible to the window:—*Held* that this evidence did not justify a conviction of the defendant, under 3 & 4 Vic., c. 6, s. 13, for selling beer to be consumed on the premises where sold. (e)

The penalties imposed by the 3 Vic., c. 47, for selling liquor without license, are recoverable before the Mayor of Frederickton, under the Act of Incorporation, 14 Vic., c. 15, s. 67. The Mayor, being *ex officio* a Justice of the

(a) *Peaché and Coleman*, L. R. 1 C. P. 324.

(b) *Peplow and Richardson*, L. R. 4, C. P. 168.

(c) *Davis and Scrace*, L. R. 4, C. P. 172; *Taylor v. Humphries*, 17 C. B. N. S. 539, followed; *Reg. v. Cumberland*, 5 U. C. L. J. 119, overruled.

(d) *Morgan and Hedger*, L. R. 5 C. P. 485; *Copley and Burton*, L. R. 5 C. P. 489.

*Deal and Schofield*, L. R. 3 Q. B. 8.

Peace, may, in that character, proceed for the penalties which, by the City Charter, are made recoverable before the Mayor. (a)

Under Con. Stats., L. C., c. 6, the convicting Magistrate has a discretionary power of giving any one of the three judgments mentioned in s. 32, ss. 38 and 39, and s. 40. (b) An appeal lies to the General Quarter Sessions of the Peace from a conviction rendered by a Judge of the Sessions of the Peace in and for the City of Montreal, under s. 50 of this Statute. (c) Under the same Statute, the convicting Magistrate has the right to grant costs, either upon conviction or dismissal of the prosecution, and this even to attorneys. (d)

In *Ontario*, the 32 Vic., c. 32, professes to amend and consolidate the several enactments relating to tavern and shop licenses. The Con. Stat. Can., c. 103, has been repealed by 32 & 33 Vic., c. 36; but it is apprehended that c. 31 of this Statute, as amended by 33 Vic., c. 27, will apply to prosecutions for selling liquor without license, in the same manner as the former Statute.

*Compounding Offences.*—Compounding felony is where the party robbed not only knows the felon, but also takes his goods again, or other amends, upon agreement not to prosecute. (e) It is a misdemeanor at common law, punishable by fine and imprisonment. (f)

A prosecution is not the property of those who institute it, to deal with it as they please. The public have a higher interest in having redress rendered, and wrong punished, to deter others from offending in like manner; (g) and in general, a prosecution can only be compromised by leave

(a) *Reg. v. Allen*, 2 Allen, 435.

(b) *Ex parte Moley* 7, L. C. J. 1.

(c) *Ex parte Thompson*, 7 L. C. J. 10.

(d) *Ex parte Moley*, 7 L. C. J. 1.

(e) *Rum. Cr.* 194-5

(f) *Arch. Cr. Pldg.* 837.

(g) *Reg. v. Hammond*, 9 Solr. Jour. 216, per *Brammoell*, B.

of the Court. A prosecution for selling liquor without license cannot be compromised without the leave of the Court. (a) Leave has been granted to compound a *qui tam* action on the 82 Hy. 8, c. 9, for buying a pretended title, on paying the King's share into Court. (b)

It is equally illegal to stipulate for the compromise of a charge amounting only to a misdemeanor, if the offence is one which is injurious to the community generally, and not confined in its consequences to the prosecutor himself, as it is to compromise a charge of felony. (c)

The 18 Eliz. c. 5, contains provisions against compounding informations on penal Statutes. But this Statute does not extend to penalties which are only recoverable by information before Justices. (d)

The defendant was indicted for compounding a penal prosecution, instituted by him against one F., under 29 & 30 Vic, c. 51, s. 256. It appeared that F. had been convicted, under that Act, on the information of defendant, by the Police Magistrate of H., and a fine of \$50 imposed upon him, and that, on an appeal therefrom, defendant, for \$10, agreed with F. not to prosecute this appeal, but consented that the conviction should be quashed, which was accordingly done:—*Held* that as, in this case, the offence charged in the indictment was the compounding a penal action or prosecution that had been instituted, and as this was no offence at common law, at least as to that part of the penalty going to the informer, and as the 18 Eliz., c. 5, did not apply to the case, (e) the indictment would not lie either at common

(a) *Re Fraser*, 1 U. C. L. J. N. S. 326, per *A. Wilson*, J.

(b) *May q. t. v. Dettrick*, 5 U. C. Q. B. O. S. 77. As to stifling a prosecution for felony, and the distinction between it and compounding felony, see *Williams v. Bayley*, L. R. 1 E. & I. App. 200.

(c) *Dwight v. Ellsworth*, 9 U. C. Q. B. 540, per *Robinson*, C. J.

(d) *Reg. v. Mason*, 17 U. C. C. P. 534; *Reg. v. Crisp*, 1 B. & Ald. 282.

(e) *Reg. v. Crisp*, *supra*.

law or under the Statute, and the conviction of the defendant was therefore ordered to be annulled. (a)

*Offences by Persons in Office.*—An indictment lies against a person who wilfully neglects or refuses to execute the duties of a public office. (b) An indictment may be maintained against a deputy returning officer at an election for refusing, on the requisition of the agent of one of the candidates, to administer the oath to certain parties tendering themselves as voters. (c) But the omission of the name of the agent from such indictment will vitiate it. (d)

An indictment charging a misdemeanor against a registrar and his deputy jointly, is good, if the facts establish a joint offence. A deputy is liable to be indicted, while the principal legally holds the office, and even after the deputy himself has been dismissed from the office. (e)

*Extortion* signifies the unlawful taking by any officer, by colour of his office, of any money or thing of value that is not due to him, or more than his due, or before it is due. (f) This offence is of the degree of misdemeanor and all persons concerned therein, if guilty at all, are principals. (g) Two or more persons may be jointly convicted of extortion where they act together and concur in the demand. Where two persons sat together as magistrates, and one of them exacted a sum of money from a person charged before them with a felony, the other not dissenting, it was held that they might be jointly

(a) *Reg. v. Mason*, 17 U. C. C. P. 534; see also *R. v. Stone*, 4 C. & P. 379; *R. v. Gotley*, R. & R. 84; *R. v. Best*, 2 Mood. C. C. 125; Arch. Cr. Pldg. 837; *Macfarlane v. Devoy*, 15 L. C. J. 85; 32 & 33 Vic., c. 21, s. 115.

(b) *Reg. v. Bennet*, 21 U. C. C. P. 238, per Galt, J.

(c) *Ib.*

(d) *Ib.*

(e) *Reg. v. Benjamin*, 4 U. C. C. P. 179.

(f) *Kum. Cr.* 208.

(g) *Reg. v. Tisdale*, 20 U. C. Q. B. 273, per Robinson, C. J.

convicted. (a) It is not necessary that the indictment should charge the defendants with having acted corruptly. (b)

The courts do not quash indictments for extortion, but leave the defendants to demur. (c)

The Stat. of West. 3 Ed. 1, c. 26, would seem to apply here. (d).

As to the fees which may be legally exacted by public officers in different cases, it is a general rule that when a duty is cast upon any one by Act of Parliament, and no remuneration is provided for doing it, the party is to perform the duty without remuneration. (e) A clerk of the peace is an officer serving the Crown, and appointed to discharge public duties, and he cannot charge fees for any service for the remuneration of which no provision is made by Statute or otherwise expressly assigned to him by law; (f) for it is a maxim of law that no fee can be demanded for services rendered in the administration of justice, except such as can be shown to have a clear legal origin, either as being specifically allowed in some Act of Parliament, or as being sanctioned by some court or officer that has been permitted by ancient usage to award a fee for the service. (g)

All new offices erected with new fees, or old offices with new fees, are within the Stat. 34 Ed. 1, for that is tallage upon the subject, which cannot be done without common assent by Act of Parliament. (h) A clerk of the peace is not entitled to any fee from the parties to a

(a) *Reg. v. Tisdale*, 20 U. C. Q. B. 273, per *Robinson*, C. J.

(b) *Ib.*

(c) *Ib.* 272, per *Robinson*, C. J.; and see *Rex v. Wadsworth*, 5 Mod. 13.

(d) See *Askin v. London District Council*, 1 U. C. Q. B. 292.

(e) *Ib.* 295, per *Robinson*, C. J.; *Graham v. Grill*, 2 M. & S. 295.

(f) *Askin v. London Dis. Council*, 1 U. C. Q. B. 292.

(g) *Hooker v. Gurnett*, 16 U. C. Q. B. 183, per *Robinson*, C. J.; *Price v. Perceval*, S. L. C. A. 189; the *London S. V. A. R.* 140.

(h) The *London S. V. A. R.* 140.

cause for striking a special Jury. (a) The table of fees established and promulgated by the Courts, contains all the services for which clerks of the peace are entitled to charge, except that they are entitled to fees in all cases where such fees are authorized by Act of Parliament; but no local tariff or user in particular counties can give any additional right. (b)

In *Re Barnhart v. Justices' Home District* (c), a *mandamus* was moved for to compel the justices of the peace to make an order upon their treasurer to pay to Barnhart, the late gaoler, several sums of money which he claimed, first, for the expense of a guard provided by him to prevent the escape of prisoners, rendered necessary, as he said, by the insufficiency of the gaol; second, for expenses defrayed by him in retaking prisoners who had escaped from the gaol. The *mandamus* was refused, as a *mandamus* never issues except to admit or restore a person to an ascertained right, and the law makes no provision for these charges, but they rest in the discretion of the justices.

It would be illegal, as manifestly contrary to duty, as well as public policy, in a judge to take from the party in whose favour he purposes to decide an undertaking, to indemnify him against all the consequences of his decision. (d) A conviction against a bailiff for exacting more than his legal fees was quashed, on the ground that the magistrate permitted an amendment in the information, and because no precise date of the offence was given. (e) The fees of office and taxes payable to the

(a) *Hooper v. Gurnett*, 16 U. C. Q. B. 180.

(b) *Re Dartnell*, 26 U. C. Q. B. 430. See as to auditing accounts of the Clerk of the Peace, *Re Pousett and Corporation, Lambton*, 22 U. C. Q. B. 80.

(c) 5 U. C. Q. B. O. S. 507.

(d) *Ballard v. Pope*, 3 U. C. Q. B. 320, per *Robinson*, C. J.

(e) *Ex parte Smith*, 6 L. C. R. 488.

clerk of appeals, Queen's Bench, belong to, and form part of, the revenue of the Crown. (a)

*Sale of Offices.*—It would seem that an indictment or information lies at common law for the sale of a public office, on the ground that public policy requires that there should be no money consideration for the appointment to any office in which the public are interested, and that the public will be better served by having persons best qualified to fill offices appointed to them; and if money may be given to those who appoint, or through whom an office may be obtained, it would be a temptation to appoint improper persons. (b)

The office of sheriff is an office concerning the administration or execution of public justice, and the sale of it is illegal. The defendant agreed with R., then sheriff of the county of Norfolk, to give him £500, and an annuity of £800 a year, if he would resign. R. accordingly placed his resignation in defendant's hands. The £500 was paid, and certain lands conveyed to secure the annuity; and it was further agreed that in the event of the resignation being returned, and R. continuing to hold the office, the money should be repaid, and the land reconveyed. But R. did not undertake in any way to assist in procuring the appointment for the defendant. The latter having been appointed by the Government in ignorance of the agreement, an information was filed against him:—*Held* that this was an illegal transaction, as being, in fact, a purchase of the office, within the 5 & 6 Ed. 6, c. 16, and that an information might be sustained under this Act as for a misdemeanor; but, at all events, if not sustainable under this Act, the British Act 49 Geo. 8, c. 126, clearly applied in this Province, and made it a

(a) *Reg. v. Holt*, 13 L. C. R. 306.

(b) *Reg. v. Mercer*, 17 U. C. Q. B. 625, per *M'Lean*, J.; and see *Russ. Cr. 214*; *Rex v. Vaughan*, 4 Burr., 2494; *Rex v. Pollman*, 2 Camp. 229.

misdeemeanor. (a) The ignorance of the Government as to the illegal agreement was immaterial. (b)

In another case, a sheriff agreed with one O. to give the latter all the fees of his office, except for certain services specified, in consideration of which O. was to pay him £300 a year quarterly in advance, not out of the fees, but absolutely and without reference to their amount:—*Held* that this was a sale of the deputation of the office, and was clearly prohibited by the 5 & 6 Ed. 6, c. 16, and 49 Geo. 3, c. 126, and that the effect of it was to forfeit the office upon conviction under a proceeding by *scire facias*. (c) But if the defendant in this case had agreed to pay his deputy a certain sum of money annually for acting as his deputy, either in regard to all his ministerial duties, or a part of them, or had agreed to give him a certain portion of the fees, or to take from him a certain portion of the fees, or a certain fixed sum annually out of the fees, he would not have brought himself within the Statute, or done anything illegal. (d)

The 49 Geo. 3, c. 126, expressly extends the 5 & 6 Ed. 6, c. 16, to the Colonies; at least such portions of it as are in their nature applicable. (e) The former Statute expressly extends the 5 & 6 Ed. 6, c. 16, to the office of Sheriff: and any act done in contravention of the latter Statute is indictable, though not expressly made so. (f)

An agreement whereby, after reciting that A. had carried on the business of a law stationer at G., and had also been sub-distributor of stamps, collector of assessed taxes, etc., there, and that he had agreed with B. for the sale of the said business, and of all his goodwill and interest

(a) *Reg. v. Mercer*, 17 U. C. Q. B. 602.

(b) *Ib.*

(c) *Reg. v. Moodie*, 20 U. C. Q. B. 389.

(d) *Ib.* 402, per *Robinson*, C. J.; see also *Foott v. Bullock*, 4 U. C. Q. B. 480.

(e) *Reg. v. Mercer*, 17 U. C. Q. B. 602.

(f) *Ib.*



therein, to him, for the sum of £300. A., in consideration of the said sum of £300, agreed to sell, and B. agreed to purchase, the said business of a law stationer at G.; and whereby it was further agreed that A. should not, at any time, after the first of March then next, carry on the business of a law stationer at G., or within ten miles thereof, or *collect* any of the assessed taxes, but would use his utmost endeavours to introduce B. to the said business and offices, is illegal and void, as being a contract for the sale of an office within the 5 & 6 Ed. 6, c. 16, and also within the 49 Geo 3, c. 126, which makes the offences prohibited by the former Statute misdemeanors. (a)

An arrangement by a clerk of the Crown to resign his office in favor of his son, on condition of sharing the revenues and emoluments of the office, is illegal and void. (b)

The Quarter Sessions is a competent tribunal to hear and determine a charge, under 1 W. & M., c. 21, s. 6, against a clerk of the peace for having "misdemeaned himself in the execution of his office." And when the Quarter Sessions have determined the charge, this Court cannot question the propriety of their decision. (c)

A Court of Justice has power to remove its officers, if unfit to be trusted with a professional *status* and character. If an advocate, for example, were found guilty of crime, there is no doubt the Court would remove him. (d) And a criminal information will lie against an officer who misconducts himself in the execution of his office. But such an information will never be granted against a Judge, unless the Court sees plainly that dishonest op-

(a) *Hopkins v. Prescott*, 4 C. B. 578; and see *Reg. v. Charrette*, 13 Q. B. 447.

(b) *Delisle and Delisle*, Rob. Dig. 89.

(c) *Wildes v. Russell*, L. R. 1, C. P. 722.

(d) *Re Wallace*, L. R. 1, P. C. App. 295, per Lord Westbury.

pressive, vindictive or corrupt motives, influenced the mind, and prompted the act complained against. (a)

On an application to file a criminal information against a Division Court Judge, for his conduct in imposing a fine, for contempt, upon a barrister employed to conduct a case before him :—*Held* that, even if his conduct were erroneously treated by the Judge as contemptuous, and, consequently, the adjudication of contempt would, on a full and deliberate examination, be found incorrect, this would afford no ground whatever for a criminal information. (b) It has been questioned whether a criminal information is proper in the case of a Judge of an inferior court of civil jurisdiction in relation to a matter over which he has exclusive jurisdiction. (c)

In *Reg. v. Ford* (d), an application was made for leave to file a *qui tam* information against a Judge of a Recorder's Court, upon the grounds that he had falsified the records of the Court, and maliciously condemned applicant as guilty of felony, upon the verdict of his peers, when, as alleged, no verdict whatever was found by the jury. The facts to support the application were, that the jury came into Court to render their verdict, and the foreman pronounced a verdict of guilty. The counsel of the accused then personally questioned some of the Jury as to the grounds of their verdict, when one of them said that he did not concur in the verdict. The attention of the Court was not drawn to this dissent, nor did it appear that they were aware of it. A verdict of guilty was recorded by the presiding Judge, and when formally read to the jury by the clerk, no objection was made. The affidavits filed in answer totally denied that

(a) *Re Recorder and Judge D. C. Toronto*, 23 U. C. Q. B. 376.

(b) *Id.*

(c) *Id.*

(d) 3 U. C. C. P. 209.

the Judge was actuated by any improper motives, and alleged that he was throughout desirous of doing his duty in a fair and impartial manner, without bias or affection for or towards any person or persons whomsoever. The affidavits further shewed that the Judge was not aware of what passed between the counsel of the accused and the jury, nor had he any information that the jury had not agreed, or the least intimation that there was any dissentient among them. The information was refused.

An attachment has been granted against Commissioners of a Court of Requests, for trying a cause in which they were interested. (a) And where a Magistrate acts in his office with a partial, malicious, or corrupt motive, he is guilty of a misdemeanor, and may be proceeded against by indictment or criminal information in the Queen's Bench. (b)

It is a well-established maxim of law that no one shall be a judge in his own cause, and the general rule applicable to judicial proceedings is, that the judgment of an interested judge is voidable, and liable to be set aside by prohibition, error, or appeal, as the case may be. (c) In cases of necessity, however, where all the Judges having exclusive jurisdiction over the subject matter happen to be interested, the objection cannot prevail. And the objection does not apply to a party claiming the protection of an Act of Parliament, though he is a necessary party to its passing, as the Governor of a Colony, there being no analogy between judicial and legislative proceedings in this respect. (d)

A direct pecuniary interest in the matter in dispute disqualifies any person from acting as a Judge in such

(a) *Rex v. McIntyre Taylor*, 22.

(b) *Burns Jus.*, vol. iii. 144-5, 13 edn.

(c) *Phillips v. Eyre*, L. R. 6, Q. B. 22, per *Willes*, J.

(d) *Ib.* 22, per *Willes*, J.

matter. (a) The interest, however, which disqualifies at common law must be direct and certain, not remote or contingent. (b)

The mere possibility of bias in favour of one of the parties does not *ipso facto* avoid the Justice's decision; in order to have that effect, the bias must be shewn at least to be *real*.

The Corporation of B. were the owners of water-works, and were empowered by Statute to take the waters of certain streams, without permission of the mill-owners, on obtaining a certificate of Justices that a certain reservoir was completed of a given capacity, and filled with water. An application was made to Justices accordingly, which was opposed by mill-owners; but, after due enquiry, the Justices granted the certificate. Two of the Justices were trustees of a hospital and friendly society respectively, each of which had lent money to the society on bonds, charging the corporate funds. Neither of the Justices could, by any possibility, have any pecuniary interest in these bonds; but the security of their *cestui que trusts* would be improved by anything improving the borough fund, and the granting of the certificate would indirectly produce that effect, as increasing the value of the water-works. There was no ground to doubt that the Justices had acted *bona fide*:—*Held* that the Justices were not disqualified from acting in the granting of the certificate, and the Court refused a *certiorari* for the purpose of quashing it. (c)

But if a Judge is really biassed in favour of one of the parties, it would be very wrong in him to act, and seems the Court would interpose in such case. (d)

(a) *Reg. v. Rand*, L. R. 1 Q. B. 232, per *Blackburn*, J.

(b) *Reg. v. M. S. & L. Ry. Co.*, L. R. 2 Q. B. 339, per *Mellor*, J.

(c) *Reg. v. Rand*, L. R. 1 Q. B. 230.

(d) *Ib.* 233, per *Blackburn*, J.

It seems no objection to a Justice that he is remotely connected with one of the parties, so long as there is no consanguinity or affinity. (a)

If a person assault a Justice, the latter might, at the time of the assault, order him into custody; but when the act is over, and time intervenes, so that there is no present disturbance, it becomes, like any other offence, a matter to be dealt with upon proper complaint, upon oath, to some *other* Justice, who might issue his warrant; for neither a magistrate nor a constable is allowed to act officially in his own case, except *flagrante delictu*, while there is otherwise danger of escape, or to suppress an actual disturbance, and enforce the law while it is in the act of being resisted. (b)

*Monopoly.*—A by-law passed under 31 Vic., c. 30, s. 44, for exempting from taxation any person commencing any new manufacture of the nature contemplated by the section, and employing therein more than \$1,000, and paying to operators more than \$30 weekly, was held bad, for exempting new manufactures in preference to old-established business, and for exempting only those persons doing a specified amount of business. (c) The giving to one person of a trade a benefit which another of the same trade does not get also, is a monopoly of the worst description; (d) and a by-law passed for such a purpose would be void.

Rules in restraint of trade are not criminal, though they may be void as against public policy. (e) Nor are strikes necessarily illegal, and their legality or illegality must depend on the means by which they are enforced,

(a) *Reg. v. Comrs. High Ways, St. Joseph*, 3 Kerr, 583. See also on this subject *Wildes v. Russell*, L. R. 1 C. P. 722; *Ex parte Leonard*, 1 Allen, 269.

(b) *Powell v. Williamson*, 1 U. C. Q. B. 156. per Robinson, C. J.

(c) *Pirie and the Corporation of Dundas*, 29 U. C. Q. B. 401.

(d) *Ib.* 407, per A. Wilson, J.

(e) *Reg. v. Stainer*, L. R. 1 C. C. R. 230, 39 L. J. (M. C.) 54.

and upon their objects. They may be criminal, if part of a combination for the purpose of injuring or molesting either masters or men, or they may be simply illegal, as when they are the result of an arrangement depriving those engaged therein of the liberty of action. (a)

“The Trade Unions Act, 1872,” declares that the purposes of any Trade Union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful, so as to render any member of such Trade Union liable to a criminal prosecution for conspiracy, or otherwise.

By an Act of the last session of the Dominion Parliament, every person who uses violence to any person, or any property, or threatens or intimidates any person in such a manner as would justify a Justice of the Peace, on complaint made to him, to bind over the person so threatening or intimidating to keep the peace, or who “molests” or “obstructs” any person in manner defined by the Act, with a view to coerce such person—being a master, to dismiss or cease to employ any workman; or, being a workman, to quit any employment, or return work before it is finished; being a master, not to offer, or, being a workman, not to accept, any employment or work; being a master or workman, to belong to, or not to belong to, any temporary or permanent association or combination; being a master or workman, to pay any fine or penalty imposed by any temporary or permanent association or combination; being a master, to alter the mode of carrying on his business, or the number or description of any persons employed by him—shall be guilty of an offence against the Act, and shall be liable to imprisonment, with or without hard labour, for a term not exceeding three months.

(a) *Farrer v. Close*, L. R. 4 Q. B. 612, per *Hannen, J.*; *Hilton v. Eckersley* & B. 47.

Any person shall, for the purposes of this Act, be deemed to molest or obstruct another person in any of the following cases:—that is to say (1) If he persistently follows such other person about from place to place; (2) If he hides any tools, clothes, or other property owned or used by such other person, or deprives him of, or hinders him in the use thereof; (3) If he watches or besets the house or place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place, or if with two or more other persons he follows such other person, in a disorderly manner, in or through any street or road.

By the 32 & 33 Vic., c. 20, s. 42, assaults in pursuance of any unlawful combination or conspiracy to raise the rate of wages, are punishable as misdemeanors.

These Statutes, in a great measure, assimilate the law as to trades unions and strikes to that existing in England. Several cases have been decided in England, which may assist in the construction of the Canadian Statutes. (a)

A by-law of Frederickton, to regulate the public market, required the stalls in the market to be leased annually, and declared that the lessee of a stall should receive from the Mayor a license to occupy, and that any person occupying without license should be liable to a penalty:—*Held*, in a prosecution for the penalty, that the only question was, whether the defendant had a license. (b)

*Champerty and Maintenance.*—The offence of champerty

(a) See *Reg. v. Bykerdike*, 1 M. & Rob, 179; *Reg. v. Rowlands*, 2 Den, 364, 17 Q. B. 671; *Reg. v. Duffield*, 5 Cox, 404; *Walsby v. Anley*, 30 L. J. (M. C.) 121; *O'Neill v. Longman*, 4 B. & S. 376; *O'Neill v. Kruger*, 4 B. & S. 389; *Reg. v. Druitt*, 10 Cox, 592, 601-2; *Reg. v. Shepherd*, 11 Cox, 325; *Reg. v. Selsby*, 5 Cox, C. C. 495; *Hilton v. Eckersly*, 6 E. & B. 47-53; 24 L. J. Q. B. 353; *Hornby v. Close*, L. R. 2 Q. B., 153; *Reg. v. Hunt*, 8 C. & P. 642; *Reg. v. Hewit*, 5 Cox, C. C. 162.

(b) *Ex parte Milligan*, 2 Allen, 583; see as to forestalling, *Wilson v. Corporation, St. Catherines*, 21 U. C. C. P. 462.

is defined in the old books to be the unlawful maintenance of a suit, in consideration of some bargain to have part of the thing in dispute, or some profit out of it. (a) The object of the law is not so much to prevent the purchase or assignment of a matter in litigation, as the purchase or assignment of a matter in litigation, with the object of maintaining and taking part in the litigation. (b) All the cases of champerty and maintenance are founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce. (c)

The principles of the law of maintenance are recognised and adhered to in the modern cases. (d) But the general doctrines of the law are largely modified, and restrained in their operation to cases where there is danger of oppression or abuse; (e) or where a man improperly, and for the purpose of stirring up litigation or strife, or of profiting by it, encourages others to bring actions, or make defences, which they have no right to make. (f)

Champerty is punishable at common law. (g) It seems the Crown is bound by the law on this subject. In *Smyth v. M'Donald*, (h) it was held that the Crown must first eject the occupant before selling land of which it is not in possession; and that neither the 32 Hy. 8, c. 9, nor the ordinary principles of the common law, allowed the conveyance of such land by the Crown. (i)

The plaintiff having recovered judgment against B. &

(a) *Carr v. Tannahill*, 30 U. C. Q. B. 223, per *Morrison*, J.; *Kerr v. Brunton* 24 U. C. Q. B. 395, per *Hagarty*, J.; *Stanley v. Jones*, 7 Bing, 369.

(b) *Carr v. Tannahill*, *supra*, 223, per *Morrison*, J.

(c) *Ib.* 224, per *Morrison*, J.; *Prosser v. Edmonds*, 1 Y. & C. 497.

(d) *Carr v. Tannahill*, *supra*, 227, per *Morrison*, J.

(e) *Allan v. M'Heffey*, 1 Oldright, 121, per *Young*, C. J.

(f) *Ib.* 122, per *Young*, C. J.

(g) *Scott v. Henderson*, 2 Thomson, 116, per *Haliburton*, C. J.

(h) 1 Oldright, 274

(i) And see *Scott v. Henderson*, *supra*, 116 per *Haliburton*, C. J.



P., agreed with the defendant that, if such judgment, or any portion of it, should be realized from property to be pointed out by him, the defendant should have one-third of the amount so realized. The agreement further provided that "all costs that may be incurred in endeavouring to make the money to be payable by him (the defendant), if unsuccessful, and the amount of such costs to be the first charge on any proceeds, the net balance to be divided." Goods pointed out by the defendant having been seized, under the plaintiff's execution, were claimed, and, on an interpleader issue, were found to be the claimant's. The plaintiffs thereupon sued defendant upon the agreement for their costs of defence in the interpleader, etc., which they had been compelled to pay:—*Held* that such agreement, if not champerty, was illegal, as being opposed to public policy, and the due administration of justice. (a)

Whether or no there must be a suit pending to constitute maintenance does not seem perfectly clear. The argument employed in *Kerr v. Brunton*, against the agreement being maintenance, was, that no suit was pending about any property, nor was it binding on the plaintiff to bring any suit. The Court did not actually decide that the agreement amounted to maintenance, in its strict sense, but held that, at all events, it was a great misdemeanor in the nature of the thing, and equally criminal at common law. (b) It would seem, from *Sprye v. Porter*, (c) that the agreement in *Kerr v. Brunton* was maintenance. In the former case, A., in consideration of one-fifth of the property to be recovered, agreed that, in case it should become necessary to institute proceedings at law or in equity, he would furnish such information

(a) *Kerr v. Brunton*, 24 U. C. Q. B. 390.

(b) See *Wood v. Downes*, 18 ves. 125.

(c) 7 E. & B. 58.

and evidence as would ensure the recovery of the property; and Lord *Campbell* characterizes this as "maintenance in its worst aspect," although no proceeding was actually commenced or pending.

The plaintiffs having filed a bill for specific performance of a contract by one R. to sell a certain mine to them, it was agreed between the plaintiffs and T., one of the now defendants, while such suit was pending, that certain persons should purchase said mine from the plaintiffs; that they should deposit the money required for security for costs which the plaintiffs had been ordered to give in said suit, and pay all costs incurred, or to be incurred therein, or any other suit brought or defended by them respecting said mine, and pay all moneys due for the purchase thereof; and, lastly, to allot to each of the plaintiffs a twentieth share therein, if they should succeed in getting a title through the suit, and that they would settle all claims of Messrs. E. & G. against the plaintiffs. The plaintiffs having sued defendants on the last-mentioned covenant:—*Held* upon demurrer to a plea setting out the transaction that the agreement was void for champerty and maintenance. (a) But the agreement of T. to purchase the mine, though then in litigation, was not necessarily illegal. (b) The agreement with respect to the costs, that T. should pay them, and carry on the proceedings, was probably illegal. (c) If T. had an interest in the property at the time of the purchase from the plaintiffs, the purchase or prosecution of the suit would not have been illegal (d); or if he then had a

(a) *Carr v. Tannahill*, 30 U. C. Q. B. 217.

(b) S. C. 31 U. C. Q. B. 209, per *Wilson, J.*; *Harrington v. Long*, 2 M. & K. 303.

(c) *Carr v. Tannahill*, 31 U. C. Q. B. 209, per *Wilson, J.*; *Hunter v. Daniel*, 4 Hare, 431.

(d) *Id.*, 420-430.

claim which he believed gave him an interest in the property. (a)

A sharing in the profits derived from the success of the suit is essential to constitute champerty. (b) The plaintiff agreed with a solicitor to give him a portion of the profits arising from the successful prosecution of a suit to establish his right to certain coal mines, upon being indemnified against the costs of the proceedings:—*Held* that the contract amounted to champerty and maintenance. (c)

After verdict and before judgment, a plaintiff in ejectment assigned the subject matter of the suit to his attorney, as a security for money advanced by the attorney in carrying on the suit, and for other purposes, and for the amount due to him for his professional services:—*Held*, affirming the judgment of the Queen's Bench, that the assignment was not void as against public policy, or by reason of any of the statutes against champerty and maintenance (d); for the contract was confined to the payment of a debt already due for costs subject to taxation; and, therefore, the attorney got nothing but a security for a just debt.

A conveyance, whether voluntary, or for valuable consideration of property which the grantor has previously conveyed by deed, voidable in equity, is not void on the ground of champerty. (e) An agreement by a shareholder in a company which is being compulsorily wound up, that, in consideration of a pecuniary equivalent, he will support the claim of a creditor, comes within the

(a) *Findon v. Parker*, 11 M & W. 675; *Carr v. Tannahill*, *supra*, 210, per A. Wilson, J.

(b) *Hartley v. Russell*, 2 S. & St. 244-252; *Carr v. Tannahill*, *supra*, 210, per Wilson, J.

(c) *Hilton v. Woods*, L. R. 4, Eq. 432.

(d) *Anderson v. Radcliffe*, 7 U. C. L. J. 23 (ex Chr.) E. B. & E. 806-819.

(e) *Dickenson v. Burrell*, L. R. 1 Eq. 337.

rule of law against maintenance, because it is to uphold a claim to the disturbance of common right. (a)

The 32 Hy. 8, c. 9, as to selling pretended titles, is in force here. (b) The intention of this statute and the ground of the principle of the common law, which is said to be fully in accordance with it, was that a person claiming a right which he knew to be disputed, should not sell a mere law suit, but should first reduce the right to possession and then sell. (c) A person cannot be convicted on this Statute merely upon his own admission that he has taken a deed from a party out of possession. Some evidence *aliunde* must be adduced of the existence of such deed. (d)

Buying an equity of redemption in a mortgaged property, of which the person selling has been out of possession for many years, is not buying a disputed title within the Statute. (e)

In *Ontario*, by the Con. Stat. U. C. c. 90, s. 5, the 32 Hy. 8, c. 9, is to some extent repealed, and a person selling a right of entry is protected from the penalties imposed by the 32 Hy. 8, c. 9; for he can no longer be looked upon as selling a *pretended* right, when the law allows such right to be the subject of legal conveyance. (f) But it would seem that the Statute is only repealed to the extent of permitting a man to sell and convey a right of entry which is actually subsisting in himself, and that the sale of a pretended right which does not in fact exist is still within the Statute. (g)

The (Ont.) 35 Vic., c. 12, renders choses in action as-

(a) *Elliott v. Richardson*, L. R. 5 C. P. 748, per *Willes*, J.

(b) *Ante* p. 20.

(c) *Ross, q. t. v. Meyers*, 9 U. C. Q. B. 288, per *Robinson*, C. J.

(d) *Aubrey q. t. v. Smith*, 7 U. C. Q. B. 213.

(e) *M'Kensie v. Miller*, 6 U. C. Q. B. O. S. 459.

(f) *Baby q. t. v. Watson*, 13 U. C. Q. B. 531.

(g) *Id.*

signable at law. This enactment conflicts in principle with the 32 Hy. 8, c. 9.

*Bigamy.*—It would seem from the express language of the 32 & 33 Vic., c. 20, s. 58, that it only applies to the case of a *second* marriage, and that the offence of polygamy, in its ordinary acceptation, is not comprehended within its provisions. Assuming that under this Statute a person guilty of polygamy cannot relieve himself from the penalties attaching to bigamy, it may be a question, in the event of a plurality of marriages, to which of them proof should be directed; whether any two of them, or the first and second, or all.

The 4 Ed. 6, Stat. 3, c. 5, and 1 Jac. 1, c. 11, may perhaps apply here, except in so far as they are superseded by the Colonial Act.

On trials for bigamy, the guilt or innocence of the defendant depends upon the legality of the first marriage; and before the jury can convict him they must clearly see that a prior legal marriage has in fact taken place (*a*) It seems that if the marriage is *voidable* merely, it will suffice to constitute bigamy. (*b*) It has been held that though the second marriage would have been void, as for consanguinity or the like, the defendant is guilty of bigamy. (*c*) But the majority of the Judges of the Irish Court of Criminal Appeal have held that to constitute the offence of bigamy, the second marriage must be one which, but for the existence of the previous marriage, would have been a valid marriage. (*d*) This doctrine has been very materially modified in a late case. (*e*) It is there laid down that it is the appearing to

(*a*) *Breakey v. Breakey*, 2 U. C. Q. B. 353, per *Robinson*, C. J.

(*b*) *R v. Jacobs*, 2 Mood. C. C. 140; Arch. Cr. Pldg. 886.

(*c*) *Reg. v. Brawn*, 1 C. & K. 144.

(*d*) *Reg. v. Fanning*, 10 Cox, 411; see also *Reg. v. Clarke*, *ib.* 474; Arch. Cr. Pldg. 887.

(*e*) *Reg. v. Allen*, *infra*.

contract a second marriage, and the going through the ceremony which constitutes the crime of bigamy. (a)

Where a person already bound by an existing marriage, goes through a form of marriage known to and recognized by the law as capable of producing a valid marriage, for the purpose of a pretended and fictitious marriage, such person is guilty of bigamy, notwithstanding any special circumstances which, independently of the bigamous character of the marriage, may constitute a legal disability in the parties, or make the form of marriage resorted to inapplicable to their particular case. The prisoner, having a wife living, went through the ceremony of marriage with another woman, who was within the prohibited degrees of consanguinity, so that the second marriage, even if not bigamous, would have been void under the 5 & 6 Wm. 4, c. 54, s. 2:—*Held that the prisoner was guilty of bigamy.* (b)

The material enquiry, therefore, in cases of bigamy, is as to the validity of the alleged marriages, and the evidence by which such validity may be established.

Under the Con. Stat. U. C. c. 82, s. 6, a copy of an extract from the register of the marriage produced from the proper custody, if signed and certified in compliance with this clause, is sufficient evidence of the marriage, provided some proof, either direct or presumptive, be given of the identity of the parties. (c)

Evidence of reputation, or the presumption of marriage, arising from long cohabitation, will not suffice on indictments for bigamy, but there must be proof of a marriage in fact, such as the court can judicially hold to be

(a) See *Reg. v. Brown*, *supra*, 144, per *Ld. Denman*; *Reg. v. Penson*, 5 C. & P. 412.

(b) *Reg. v. Allen*, L. R. 1, C. C. R. 367; *Reg. v. Fanning*, *supra*, disapproved.

(c) *Re Hall's Estate*, 22 L. J. (Ch.) 177; *Re Porter's Trusts*, 25 L. J. (Ch.) 698; Arch. Cr. Pldg. 884.

valid. (a) The admission of the first marriage by the prisoner, unsupported by other testimony, is sufficient to support a conviction for bigamy (b) The prisoner's admission of a prior marriage is evidence that it was lawfully solemnized. (c) The first wife is not admissible as a witness to prove that her marriage with the prisoner was invalid (d); and she cannot be allowed to give evidence either for or against the prisoner. (e) But, after proof of the first marriage, the second wife may be a witness; (f) for then it appears that she is not the legal wife of the prisoner. (g)

On an indictment for bigamy, the witness called to prove the first marriage swore that it was solemnized by a Justice of the Peace, in the State of New York, who had power to marry; but this witness was not a lawyer or inhabitant of the United States, and did not state how the authority was derived, as by written law or otherwise. Although the Court, in their individual capacity, knew that Justices of the Peace had such power in the State of New York, and that the evidence given was correct, yet they held it insufficient (h)

Where the prisoner relies on the first wife's lengthened absence, and his ignorance of her being alive, he must shew enquiries made, and that he had reason to believe her dead, or, at least, could not ascertain where she was, or that she was living, more especially where he has

(a) *Reg. v. Smith*, 14 U. C. Q. B. 567-8, per *Robinson*, C. J.; *Breakey v. Breakey*, 2 U. C. Q. B. 353, per *Robinson*, C. J.; and see *Doc Dem, Wheeler v. M<sup>r</sup> Williams*, 3 U. C. Q. B. 165.

(b) *Reg. v. Creamer*, 10 L. C. R. 404.

(c) *R. v. Newton*, 2 M. & Rob, 503; *R. v. Simmonsto*, 1 C. & K. 164; Arch. Cr. Pldg. 885.

(d) *Reg. v. Madden*, 14 U. C. Q. B. 588; 3 U. C. L. J. 106; *Reg. v. Tubbee*, 1 U. C. P. R. 103, per *Macaulay*, C. J.

(e) *Reg. v. Bienvenu*, 15 L. C. J. 141.

(f) *Reg. v. Tubbee*, *supra*, 98.

(g) *Reg. v. Madden*, *supra*, 3 U. C. L. J., 106, per *Robinson*, C. J.

(h) *Reg. v. Smith*, 14 U. C. Q. B. 565.

deserted her, and this notwithstanding that the first wife has married again. (a)

Upon a trial for bigamy, when it is proved that the prisoner and his first wife have lived apart for the seven years preceding the second marriage, it is incumbent on the prosecution to shew that during that time he was aware of her existence; and, in the absence of such proof, the prisoner is entitled to an acquittal. (b) The ground of the decision in this case was, that the prisoner should not be called upon to prove a negative. (c)

On an indictment for bigamy, it is incumbent on the prosecution to prove to the satisfaction of the jury that the husband or wife, as the case may be, was alive at the date of the second marriage. This is purely a question of fact for the jury to decide on the particular circumstances of the case, and there is no presumption of law either that the party is alive or dead. (d) Therefore, where, on a trial for bigamy, it was proved that the prisoner married A. in 1836, left him in 1843, and married again in 1847. Nothing was heard of A. after the prisoner left him, nor was any evidence given of his age. The Court held that there was no presumption of law either in favour of or against the continuance of A.'s life up to 1847, but that it was a question for the jury, as a matter of fact, whether or not A. was alive at the date of the second marriage. (e) But when the case is brought within the operation of the proviso in the 32 & 33 Vic., c. 20, s. 58, which exempts from criminal liability "any person marrying a second time, whose husband or wife has been continually absent from such person for the

(a) *Reg. v. Smith*, 14 U. C. Q. B. 565.

(b) *Reg. v. Curgerwen*, L. R. 1, C. C. R. 1; 35 L. J. (M. C.) 58; *Reg. v. Bien-  
eau*, 15 L. C. J. 141.

(c) *Ib.*; see also *Reg. v. Heaton*, 3 F. & F. 819.

(d) *Reg. v. Lumley*, L. R. 1 C. C. R. 196; 38 L. J. (M. C.) 86.

(e) *Ib.*



space of seven years, then last past," there is no question for the jury, and the prisoner is exonerated from criminal liability, though the first husband or wife be proved to have been living at the time when the second marriage was contracted. By this proviso, the Legislature sanctions a presumption that a person who has not been heard of for seven years is dead; but the proviso affords no ground for the converse proposition,—namely, that when a person has been seen or heard of within seven years, a presumption arises that he is still living. (a)

The prisoner having a wife living, was married to another woman in the presence of the registrar, describing himself, not as E. R., his true name, but as B. R. There was no evidence to shew that the second wife knew that his christian name was misdescribed:—*Held*, nevertheless, that the prisoner was guilty of bigamy, for the presumption in favour of marriage clearly imposed the burden of proving the invalidity of the second marriage upon the prisoner. (b)

The Common and Statute Law of England in relation to marriage, as existing at the time of the enactment of the 32 Geo. 3, c. 1, was introduced by this Statute. The Canon Law, so far as it was part of the law of England at that time, was also introduced, with the 26 Geo. 2, c. 33, 25 Hy. 8, c. 22, 28 Hy. 8, c. 7, 28 Hy. 8, c. 16, and 32 Hy. 8, c. 38, so far as they remained in force in England. (c)

Before the 26 Geo. 2, c. 33, clandestine marriages, though not void, were illegal, and subjected the parties to ecclesiastical censure: i. e., all marriages were required to be celebrated in *facie ecclesiæ*, and by banns or licence, or if a minor, by consent of parents, otherwise they were

(a) *Reg. v. Lumley*, L. R. 1 C. C. R. 198, per *Lush*, J.

(b) *Reg. v. R-a*, L. R., 1 C. C. R. 365.

(c) *Hodgins v. M'Neil*, 9 U. C. L. J. 126, per *Esten*, V. C., 9 Grant, 305; *Reg. v. Roblin*, 21 U. C. Q. B. 357. See 9 U. C. L. J. 1, as to the English marriage laws when the 32 Geo. 3, c. 1, was passed.

voidable in the ecclesiastical courts. Such marriages were rendered void by this Statute, but the 11th clause thereof, in which the avoiding provision is contained, does not apply here. It is therefore illegal in this country, as it was in England before the 26 Geo. 2, c. 33, to marry by license, where both or either of the parties are under twenty-one, without the consent of parents or guardians. But such marriages are not absolutely void. They are, however, irregular, and in breach of the usual bond conditioned that no impediment exists. (a)

The Imp. Act 5 & 6 Wm. 4, c. 54, is one of convenience and policy, and does not expressly, or by necessary intendment, extend to the Colonies. It is, therefore, not in force here. This Statute avoids all marriages celebrated between persons within the prohibited degrees of consanguinity; and, under it, a marriage by a man with the sister of his deceased wife is absolutely void (b), though solemnized abroad between British subjects, in a country by the law of which the marriage would have been valid. (c) This doctrine does not apply here; consequently the marriage of a man with the sister of his deceased wife is not void. (d)

To render a marriage contracted by banns invalid, it must be contracted with a knowledge by both parties that no true publication of banns has taken place. (e)

It seems that if parties are married by banns, it is no objection that they are under age; at all events, such was the law in England prior to the 26 Geo. 2, c. 33. (f) As the publication of banns in the open manner required gives parents and guardians timely notice of the intended

(a) *Hodgins v. McNeil*; *Reg. v. Roblin*, *supra*.

(b) *Reg. v. Chadwick*, 11 Q. B. 173; 17 L. J. (M. C.) 33.

(c) *Brook v. Brook*, 3 Smale & G. 481.

(d) *Hodgins v. McNeil*, 9 Grant, 305; 9 U. C. L. J. 126.

(e) *Reg. v. Rex*, L. R. 1 C. C. R. 365, per *Kelly*, C. B.; *Rex v. Wroton*, 4 B. & Ad. 640; *Tongue v. Tongue*, 1 Moore, P. C. cases, 90.

(f) *Rex v. Inhab Hodnetts*, 1 T. R. 99, per Lord Mansfield.

marriage, and an opportunity of forbidding it, so that, if they make no effort to prevent it, their consent may reasonably be assumed, (a) it would not seem unreasonable to hold that the marriage by banns of a minor should be valid. Where banns have been published, and no dissent been expressed by parents or guardians, at the time of publication, the husband being under age does not make the marriage void, even by the English marriage act 26 Geo. 2, c. 33. (b) It is not necessary that marriages should be solemnized in a church, or within any particular hours. (c)

The Imp. Stat. 28 & 29 Vic., c. 64, declares that Colonial laws establishing the validity of marriages shall have effect throughout Her Majesty's Dominions. The 11 Geo. 4, c. 36, cured defects in the form of marriages solemnized by Justices of the Peace before the passing of the Act. (d)

The 18 Vic., c. 129, indicates clearly that the former Statute was not intended to operate retrospectively, except in the case of marriages solemnized by persons who before that Act had authority to solemnize marriage. The 11 Geo. 4, c. 36, had two distinct objects,—first, to remove difficulties which might arise in consequence of marriages having been irregularly performed by persons who had authority to marry; and, secondly, to confer authority to solemnize marriages upon ministers of certain religious bodies, whose ministers had no such authority before that Act was passed. The Act has retrospective force as to the latter object only. (e)

The 23 Vic., c. 11, and 24 Vic., c. 46, confirm and legalize certain marriages therein mentioned. The 25 Vic.,

(a) *Reg. v. Roblin*, 21 U. C. Q. B. 454, per *Robinson*, C. J.

(b) *Reg. v. Secker*, 14 U. C. Q. B. 604.

(c) *Reg. v. Secker*, *supra*; Con. Stat. U. C. c. 72, s. 3.

(d) *Doe dem, Wheeler, v. M'Williams*, 2 U. C. Q. B. 77.

(e) *Pringle v. Allan*, 18 U. C. Q. B. 578, per *Robinson*, C. J.

cs. 46 and 47, contain certain provisions as to registering marriages and the offences connected therewith. Marriages contracted in Ireland between members of the Church of England and Presbyterians celebrated by ministers not belonging to the Church of England are legalized by the Imp. Stat. 5 & 6 Vic., c. 26, and such marriages celebrated before that Act was passed, are legal marriages in this country. (a) A written contract is not essential to the validity of a Jewish marriage which has been solemnized with all the usual forms and ceremonies of the Jewish service and faith. Such marriage is valid, though there exists in relation to it a written contract which is not produced. (b) A case has been decided in Quebec as to the marriage of a Lower Canadian by birth with a Squaw of the Cree nation. (c) In this case it was held (*inter alia*) that a marriage contracted where there are no priests, no magistrates, or civil or religious authority, and no registers, is valid, though not accompanied by any religious or civil ceremony. An Indian marriage between a Christian and a woman of that nation or tribe, is valid, notwithstanding the assumed existence of polygamy and divorce at will which are no obstacles to the recognition by our Courts of a marriage contracted according to the usages and customs of the country; and an Indian marriage, according to the usage of the Cree country, followed by cohabitation and repute, and the bringing up of a numerous family, will be recognized as a valid marriage by our Courts. (d)

A marriage in a foreign country between persons not being British subjects, if invalid there, must be held invalid in this country, though the parties have done all in their power to make it a valid legal marriage. (e) The

(a) *Breakey v. Breakey*, 2 U. C. Q. B. 349.

(b) *Frank v. Carson*, 15 U. C. C. P. 135.

(c) See *Connolly v. Woolrich*, 11 L. C. J. 197.

(d) *Ib.*

(e) *Harris v. Cooper*, 31 U. C. Q. B. 182.

age of consent to marriage in a woman is twelve, (a) and for a man fourteen. If a boy under fourteen, or a girl under twelve contracts matrimony, it is void, unless both husband and wife consent to and confirm the marriage after the minor arrives at the age of consent. (b)

In an indictment for bigamy committed in the United States, it is necessary that the indictment should contain allegations that the accused is a British subject; that he is or was resident in the Province, and that he left it with intent to commit the offence. (c) The words, "or elsewhere," in the 32 & 38 Vic., c. 20, s. 58, extend to bigamy committed in a foreign jurisdiction. (d) It is immaterial whether the second marriage take place in Canada or in a foreign country, provided, if the second marriage take place out of Canada, the accused be a subject of Her Majesty. (e) A soldier convicted of bigamy is not thereby discharged from military service. (f)

It has been held that, under the 55 Geo. 3, c. 3, a writ of *exigi facias* against a person against whom an indictment for bigamy has been found at the assizes, will be awarded by this Court upon the application of the prosecutor, without its being applied for by the Attorney-General. (g)

*Libel.*—A libel upon an individual is a malicious defamation of any person made public, either by printing, writing, signs, or pictures, in order to provoke him to wrath, or to expose him to public hatred, contempt, or ridicule. (h)

Wherever an action will lie for a libel, without laying

- (a) *Reg. v. Bell*, 15 U. C. Q. B. 287-9.
- (b) *R. v. Gordon*, R. & R. 48; Arch. Cr. Pldg. 886.
- (c) *Reg. v. M'Quiggan*, Rob. Dig. 123-4.
- (d) *Ib.*
- (e) See s. 58.
- (f) *Reg. v. Creamer*, 10 L. C. R. 404.
- (g) *Rex v. Elrod*, Taylor, 120.
- (h) Arch. Cr. Pldg. 857.

special damage, an indictment will also lie. (a) An action for libel lies against a corporation aggregate where malice in law may be inferred from the publication of the words. (b)

It would seem also that a corporation may be indicted by its corporate name, and fined for the publication of such libel. (c) A joint action may be maintained against several persons for the joint publication of a libel. (d) It seems also that an indictment or information will lie against all persons concerned in the joint publication of a libel. (e)

Where the defendant published the following of and concerning the plaintiff:—"Caution: To all persons who may be entering into any arrangements with J. M. C. for his self-action cattle and stock pump, who claims to have patented the same in April last, I wish by this notice to caution the public against having anything to do with Cousins or his pumps, *it being an infringement on my patent*, which was obtained by me in 1858. I intend to prosecute him immediately. Beware of the fraud and save costs,"—it was held that this publication disclosed a libel on the plaintiff personally, in the caution to all persons about to enter into arrangements with the plaintiff for his pumps, against having anything to do with plaintiff or his pumps, and in the words "beware of the fraud," in relation to the infringement of the patent. (f)

Where the plaintiffs were manufacturers of bags, and manufactured a bag which they called the "bag of bags;" and the defendant printed and published concerning the plaintiffs and their business the words fol-

(a) Arch. Cr. Pldg. 857; *Stanton v. Andrews*, 5 U. C. Q. B. O. S. 229, per Macaulay, J.

(b) *Whitfield v. S. E. Ry. Co.*, 4 U. C. L. J. 242; E. B. & E. 115.

(c) *E. C. Ry. Co. v. Broom*, 6 Ex. 314; Arch. Cr. Pldg. 7.

(d) *Brown v. Hirley*, 5 U. C. Q. B. O. S. 734.

(e) *Ib.*; *Rex v. Benfield Burr*, 980; 5 Mod. 167.

(f) *Cousins v. Merrill*, 16 U. C. C. P. 114.

lowing:—"As we have not seen the bag of bags, we cannot say that it is useful, or that it is portable, or that it is elegant. All these it may be. But the only point we can deal with is the title, which we think very silly, very slangy, and very vulgar, and which has been forced upon the notice of the public *ad nauseam*:"—*Held* on demurrer (by *Mellor and Hannen*, J. J.) that it was a question for the jury whether the words did not convey an imputation on the plaintiffs' conduct in their business, and whether the language went beyond the limits of fair criticism. By *Lush*, J., that the words could not be deemed libellous, either upon the plaintiffs, or upon the mode of conducting their business. (a)

The defendant published in a newspaper an article respecting the plaintiff as inspecting field-officer of volunteers and militia, in which, after referring to a recent inspection of a particular battalion, and stating that it was not often that "an example of swearing and drunkenness was set by the officers to their men," it was said that it was very little to the plaintiff's credit that "he appears before the volunteers as a transgressor without apology of those laws of discipline and good conduct, the observance of which he so strictly enjoins." In another part, it was said, "we have been for some time aware that the plaintiff was often incapable of attending to his duty here and elsewhere, and now that his evil habits appear to be entirely beyond his control, it is high time for the head of the department to deal with the case." Per *Draper*, C.J., the publication complained of, without the aid of any inuendo or explanation, is libellous. (b)

To charge a man with ingratitude is libellous, and such charge may also be libellous, notwithstanding that

(a) *Jenner v. A'Beckett*, L. R. 7 Q. B. 11.  
(b) *Baretto v. Pirie*, 26 U. C. Q. B. 469.

the facts upon which it is founded are stated, and they do not support the charge. (a)

A written paper charging the plaintiff with having wrongfully taken the defendant's logs, sawing them up and selling the lumber, is libellous, without any averment or proof that larceny was thereby imputed. (b) So a written paper, charging the plaintiff, an attorney, with being governed entirely by a craving after his own gains, without regard to the interests of his clients, and reckless of bringing them to ruin, is libellous. (c) But it is not libellous to write of a man that his outward appearance is more like an assassin than an honest man. (d)

The publication of any obscene writings is unlawful and indictable. (e) The test of an obscene publication is whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall. (f) It is no defence to an indictment for such a publication that the object of the party was laudable; (g) for, in case of libel, the law presumes that the party intended what the libel is calculated to effect. (h)

It is now well established that faithful and fair reports of the proceedings of courts of justice, though the character of individuals may incidentally suffer, are privileged, and that for the publication of such reports the publishers are neither criminally nor civilly responsible. (i) The immunity thus afforded in respect of the publication of

(a) *Cox v. Lee*, L. R. 4, Ex. 284.

(b) *Connick v. Wilson*, 2 Kerr, 496.

(c) *Andrews v. Wilson*, 3 Kerr, 86.

(d) *Lang v. Gilbert*, 4 Allen, 445.

(e) *Reg. v. Hicklin*, L. R. 3 Q. B. 360; 37 L. J. (M. C.) 89.

(f) *Ib.* 371, per Cockburn, C. J.

(g) *Ib.*

(h) *Reg. v. Atkinson*, 17 U. C. C. P. 304, per J. Wilson, J. See *ante*, p. 88.

(i) *Wason v. Walter*, L. R. 4 Q. B. 87, per Cockburn, C. J. 38 L. J. (Q. B.) 34.



the proceedings of courts of justice rests on a twofold ground:—First, the occasion is such as repels the presumption of malice, for they are published without any reference to the individuals concerned, and solely to afford information to the public for the benefit of society. The other and broader principle on which this exception to the general law of libel is founded is, that the advantage to the community from publicity being given to the proceedings of courts of justice is so great, that the occasional inconvenience to individuals arising from it must yield to the general good. (a)

As to the publication of *ex parte* proceedings of courts of justice, such as before magistrates, and even before the superior courts—as, for instance, applications for criminal informations—if an indictment were preferred for such publication, it would probably be held that the criterion of the privilege is not whether the report was or was not *ex parte*, but whether it was a fair and honest report of what had taken place, published simply with a view to the information of the public, and innocent of all intention to do injury to the party affected. (b)

As to the privilege of reporting legal proceedings, the dignity of the court cannot be regarded, but only the nature of the alleged judicial proceeding which is reported. For this purpose, no distinction can be made between a court *pie poudre* and the House of Lords sitting as a court of justice. But as to magistrates, if, while occupying the bench from which magisterial business is usually administered, they, under pretence of giving advice, publicly hear slanderous complaints, over which they have no jurisdiction, although their names may be in the commission of the peace, a report of what passes

(a) *Wason v. Walter*, L. R. 4 Q. B. 87-8, per Cockburn, C. J.

(b) *Ib.* 94, per Cockburn, C. J.

is as little privileged as if they were illiterate mechanics assembled in an alehouse. (a)

The privilege accorded to a fair and impartial report of proceedings in a public court of justice extends to preliminary proceedings on a charge of an indictable offence before a magistrate, sitting in an *open* Police Court, where the proceedings *terminate* in the dismissal of the charge, and where, the report keeping pace with the proceedings, which occupy several days, is published in parts, in different numbers of a newspaper, and a portion of it while the proceedings are pending. But the privilege does not extend to comments by the reporter reflecting on any of the parties; as in an account of proceedings out of which an abortive charge of perjury arose, to the statement that the evidence of certain witnesses entirely negatived the story of the defendant, and satisfied the Court that he knew that it was false. (b)

Proceedings before Magistrates, under the 82 & 83 Vic., c. 81, "in relation to summary convictions and orders," in which, after both parties are heard, a final judgment is given, subject to appeal, are strictly of a judicial nature; the place in which such proceedings are held is an open court; (c) the defendant, as well as the prosecutor, has a right to the assistance of attorney and counsel, and to call what witnesses he pleases; and both parties having been heard, the trial and the judgment may lawfully be made the subject of a printed report, if that report be impartial and correct. (d).

A Magistrate, upon any preliminary enquiry respecting an indictable offence, may, if he thinks fit, carry on the enquiry in private, and the publication of any such pro-

(a) *Lewis v. Levy*, 4 U. C. L. J. 215, per *Campbell*, C. J.; E. B. & E. 554.

(b) *Lewis v. Levy*, 4 U. C. L. J. 213; E. B. & E. 557.

(c) See s. 29.

(d) *Ib.* 215; per *Campbell*, C. J.

ceedings before him would be unlawful; but while he continues to sit *foribus apertis*, admitting into the room where he sits as many of the public as can be conveniently accommodated, thinking that this course is best calculated for the investigation of truth, and the satisfactory administration of justice, the Court in which he sits is to be considered as a public court of justice. (a)

An affidavit made in a judicial proceeding is privileged on the established principle that no action will lie for words spoken or written in the course of a judicial proceeding, and this although the affidavit is libellous in its language, and there is evidence of express malice. (b)

There is not a right to publish the proceedings of every public trial. (c) But a fair report of judicial proceedings, in a public Court, is protected. (d) The privilege of publishing judicial proceedings extends to all parties concerned therein. The acts, words, or writings of Judges of the superior or county courts, grand or petty jurymen, or witness, are absolutely privileged, on the ground that the law gives faith and credence to what they do in the course of a judicial proceeding. (e)

A letter, or report in writing, by a military officer, in the ordinary course of his duty as such officer, is an absolutely privileged communication, even if written maliciously, and without reasonable and probable cause. (f)

A communication made *bona fide* upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contain criminary matter which, with-

(a) *Lewis v. Levy*, 4 U. C. L. J. 216, per *Campbell*, C. J.

(b) *Henderson v. Broomhead*, 5 U. C. L. J. 262; 4 Ex. N. S. 569.

(c) *Small v. M'Kenzie*; *Draper*, 188.

(d) *Ryalls v. Leader*, L. R. 1, Ex. 296; 35 L. J. (Ex.) 185.

(e) *Dawkins v. Ld. Paulet*, L. R. 5 Q. B. 103, per *Cockburn*, C. J.

(f) *Dawkins v. Ld. Paulet*, L. R. 5, Q. B. 94, per *Mellor and Lush*, J. J., *Cockburn*, C. J., dissenting.

out this privilege, would be slanderous and actionable.

The defendant, with others, having presented a memorial to the Secretary of State for the Home Department, setting out certain acts done by the plaintiff, and complaining of his conduct, and requesting his removal from the office of a Justice of the Peace:—*Held*, in an action of libel by the plaintiff against the defendant, the jury having found *bona fides*, that the communication was privileged, since, being addressed to the Secretary of State, it was virtually an address to Her Majesty, for the removal of the plaintiff from his office, and must be taken to be done *bona fide* with a view of obtaining redress, and that the memorial was properly addressed to the Secretary of State, he having a corresponding duty to perform in the matter. (a)

An action for libel contained in communications made to the Executive Government, with a view of obtaining redress, cannot be sustained, unless it can be proved that the party making them acted maliciously, and without probable cause. (b)

A petition to the Lieutenant-Governor, complaining of a public grievance in regard to the conduct of Commissioners of the Court of Requests, and charging them with partiality, corruption, and connivance at extortion, and highly defamatory in its language, signed by a great number of persons, and praying for redress, is a privileged communication; and no action for libel will lie upon it, though the defendant has circulated it, and been the means of obtaining signatures to it of individuals who knew nothing of the facts stated in such petition, and some of whom supposed it to be a matter of a totally different description. (c)

(a) *Harrison v. Bush*, 1 U. C. L. J. 156; 5 E. & B. 344.

(b) *Rogers v. Spalding*, 1 U. C. Q. B. 258.

(c) *Stanton v. Andrews*, 5 U. C. Q. B. O. S. 211.

The principle of the law laid down in the Bill of Rights, 1 Wm. & M., stat. 2, namely, that it is the right of the subject to petition the Queen, and that all commitments and prosecutions for such petition are illegal, applies to the case of a petition to the Governor, although the latter is not the Queen. The ground on which the principle rests applies as well to petitions addressed to the head of the Executive Government as to either of the other branches of the Legislature. But, in any of these cases, evidence of malice, coupled with the knowledge that the statements were false, or the inference of malice arising from the certain consciousness on the part of the defendant that the statements were false, may, perhaps, constitute so clear a case of flagrant and intentional abuse of the right of petitioning as to destroy the privilege, and give the injured party a claim to legal redress. (a)

Petitions to the Queen, or to any of her Ministers, complaining of the conduct of an individual, and containing defamatory statements against him, are or are not privileged communications, according to the motives and intention of the petitioner in making them. If he fairly and honestly makes statements in such petition prejudicial to any person's character, but which he believes to be true, and which are made for the sole purpose of obtaining redress of what he really considers an injury or abuse, his petition is privileged. If he falsely and maliciously prefers a scandalous charge against the individual in such a petition, with the intention of committing an injury, instead of seeking redress, his petition is not privileged. The legal presumption is always in favour of the petitioner that he acts fairly and honestly, unless the circumstances of the case afford some evidence of an evil

(a) *Stanton v. Andrews*, 5 U. C. Q. B. O. S. 220, per *Robinson*, C. J.; *Fairman v. Ives*, 1 D. & R. 252; 5 B. & Ald. 642.

and malicious intention, in which case the question of privilege is a fact for the jury to determine, under the direction of the Court.

The declaration in the Bill of Rights was intended for the protection of petitioners applying to the Crown for the redress of some supposed grievances of a public and general character, and which is thought to be occasioned by some existing law, order in council, proclamation, or other act of the Government, or of any department of Government, but not a petition by one individual against another. The whole scope and spirit of the Bill of Rights points to public and political rights. Private rights were left to the protection, and private injuries to the discretion, of the common law, or to such other laws as might be made by Parliament in the ordinary course of legislation (a)

In consequence of the decision in *Stockdale v. Hansard*, (b) the 31 Vic., c. 23, was passed. S. 4 of this Act provides that in any proceeding, civil or criminal, against a person for publishing any report, paper, vote, or proceeding, by or under the authority of the Senate or House of Commons, the Court or Judge may stay all proceedings, on production of a certificate, under the hand of the Speaker or Clerk of the Senate or House of Commons, shewing the authority for the publication. (c)

Where a presumptive case of publication, by the act of any other person, by his authority, has been established, it will be a good defence for the defendant to shew that such publication was made without his authority, consent, or knowledge, and did not arise from want of due care or caution on his part. (d)

(a) *Stanton v. Andrews*, 5 U. C. Q. B. O. S., 221 *et seq.*, per *Sherwood*, J.

(b) 9 A. & E. 1; 2 Per. & D. 1.

(c) See *Stockdale v. Hansard*, 11 A. & E. 297; 3 Per. & D. 346.

(d) *Con. Stat. U. C. c. 103, s. 13.*

It would seem that s. 9 of this Statute applies to **private and personal libels only. (a)**

Members of Parliament are neither civilly nor criminally liable for anything they may say in Parliament, in the course of any proceedings therein; and, from motives of the highest policy and convenience, Ministers of the Crown cannot be held liable for any advice given to the Sovereign, however prejudicial such advice may be to individuals. (b)

But prior to the decision in *Wason v. Walter*, (c) there was no authority that the publication of a debate in Parliament was privileged. In this case, it was held that a faithful report, in a public newspaper, of a debate in either House of Parliament, containing matter disparaging to the character of an individual, which had been spoken in the course of the debate, is privileged, on the same principle as an accurate report of proceedings in a court of justice is privileged—viz., that the advantage of publicity to the community at large outweighs any private injury resulting from the publication.

The plaintiff presented a petition to the House of Lords, charging a high judicial officer with having, thirty years before, made a statement, false to his own knowledge, in order to deceive a committee of the House of Commons, and praying enquiry, and the removal of the officer, if the charge was found true. A debate ensued on the presentation of the petition, and the charge was utterly refuted,—*Held* that this was a subject of great public concern, on which a writer in a public newspaper had full right to comment, and the occasion was therefore so far privileged that the comments would not be actionable

(a) See *Reg. v. Duffy*, 2 Cox, 45.

(b) *Darwins v. Ld. Paulet*, L. R. 5, Q. B. 116-7, per Mellor, J. See also *ex parte Wason*, L. R. 4 Q. B. 573.

(c) L. R. 4 Q. B. 73; 38 L. J. (Q. B.) 34.

so long as a jury should think them honest, and made in a fair spirit, and such as were justified by the circumstances, as disclosed in an accurate report of the debate. (a)

But all the limitations placed on the publication of the proceedings of courts of justice, to prevent injustice to individuals, apply to Parliamentary debates. A garbled or partial report, or of detached parts of proceedings, published with intent to injure individuals, will equally be disentitled to protection; and the publication of a single speech in Parliament, for the purpose or with the effect of injuring an individual, will be unlawful. (b) But such a speech is privileged, if *bona fide* published by a member, for the information of his constituents. (c)

Whatever will deprive reports of proceedings in courts of justice of immunity will apply equally to a report of proceedings in Parliament.

Independently of the orders of the House, there is nothing unlawful in publishing reports of Parliamentary proceedings. (d)

When a party acts in good faith, and not officiously, in a matter of business, in which he has a personal interest, and is also employed by others, a letter written under such circumstances, though it contains a term in its gravest sense libellous, is privileged, on account of his particular and legitimate connection with the subject of which he was writing, rebutting the presumption of malice; and in the absence of evidence of actual malice, he could not be prosecuted for libel. (e)

The privilege which a communication receives must

(a) *Wason v. Walter*, L. R. 4 Q. B. 73; 38 L. J. (Q. B.) 34.

(b) *Ib.* 94, per Cockburn, C. J.; *Rex v. Lord Abington*, 1 Esp. 226; *Rex v. Cressy*, 1 M. & S. 273.

(c) *Davison v. Duncan*, 7 E. & B. 233; 26 L. J. (Q. B.) 107; *Wason v. Walter*, *supra*, 95, per Cockburn, C. J.

(d) *Ib.* 95, per Cockburn, C. J.

(e) *Hannas v. De Blaquiere*, 11 U. C. Q. B. 310.



result either from some right on the part of the defendant to say what is complained of, or from a sense of duty public or private, legal or moral, under which the defendant is acting. (a)

The proper meaning of a privileged communication is this: that the occasion on which the communication was made rebuts the inference *prima facie* arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact, and that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made. (b)

In *Campbell v. Spottiswoode*, (c) *Crompton*, J., is reported to say, "By privilege. I understand that immunity attaching to a particular class of persons, or to an individual, who, being placed in some particular position, or being charged with the performance of some particular duties, derives therefrom rights which are not shared by the community at large." And *Blackburn*, J., in the same report, says, "The word 'privilege' signifies that species of immunity attaching to a person who, by reason of the circumstances of his position, is justified in uttering or writing of another, matters which, if uttered or written by a third party, would be libellous, or slanderous, as the case may be." And in *Cowles v. Potts*, (d) quoting the language of *Parke*, B., in *Toogood v. Spyring*, (e) "The law considers such publication as malicious, unless it is fairly made, by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own

(a) *Poitevin v. Morgan*, 10 L. C. J. 99, per *Badgley*, J.; *Hearne v. Stowell*, 12 A. & E. 719-26.

(b) *Poitevin v. Morgan*, 10 L. C. J. 98, per *Badgley*, J. See also *Shaver v. Linton*, 22 U. C. Q. B. 183, per *Hagarty*, J.; *Somerville v. Hawkins*, 10 C. B. 583.

(c) 9 Jur. N. S. 1077.

(d) 11 Jur. N. S. 949.

(e) 1 C. M. & R. 181.

affairs, in matters where his interest is concerned. In such cases, *the occasion prevents the inference of malice*, which the law draws from the unauthorized communication, and affords a qualified defence, depending upon the absence of actual malice. If *fairly* warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them, within very narrow limits. (a)

This proof of express malice appears to consist, in all cases, in shewing *mala fides* in the defendant, and this renders him liable, because, by the general rule applicable to such cases, every person is bound for an intentional injury done by him to another. (b)

To entitle matter otherwise libellous to the protection which attaches to communications made in the fulfilment of a duty *bona fides* or honesty of purpose is essential; and to this again two things are necessary: First, that the communication be made not merely in the course of duty, but also from a sense of duty; and second, that it be made with a belief of its truth. (c)

Where the libel is clearly a privileged communication, the inference of malice cannot be raised on the face of the libel itself; but extrinsic evidence of actual express malice must be given, and it is not to be taken to be malicious although it may turn out to be unfounded, but the plaintiff must also prove the statement to be false as well as malicious. (d)

Malice, in its legal sense, means a wrongful act done intentionally, without just cause or excuse. (e) By legal

(a) *Smith v. Armstrong*, 26 U. C. Q. B. 59, per *Draper*, C. J.

(b) *Poitvin v. Morgan*, 10 L. C. J., 98, per *Badgley*, J.

(c) *Darwins v. Lord Paulet*, L. R. 5 Q. B., 102, per *Cockburn*, C. J.

(d) *M'Intyre v. M'Bean*, 13 U. C. Q. B. 534. See also *M'Cullough v. M'Intee*, 13 U. C. C. P. 438; *Shaver v. Linton*, 22 U. C. Q. B. 183.

(e) *Poitvin v. Morgan*, 10 L. C. J. 97, per *Badgley*, J.; *M'Intyre v. M'Bean*, 13 U. C. Q. B., 542, per *Robinson*, C. J.

malice is meant no more than the wrongful intention, which the law always presumes as accompanying a wrongful act, without any proof of malice in fact. (a)

For the purpose of proving express malice, the plaintiff may shew that the libel is really untrue; but this alone will not constitute express malice, but it may, along with other circumstances, raise an inference that express malice exists. (b)

Libellous expressions, used in a privileged communication, may be evidence of actual malice for the jury; but if taken in connection with admitted facts, they are such as might have been used honestly and *bona fide* by the defendant, the Judge may withdraw the case from the jury, and direct a verdict for the defendant. (c)

The defendant, in a privileged communication, described the plaintiff's conduct as "most disgraceful and dishonest." The conduct so described was equivocal, and might honestly have been supposed by the defendant to be as he described it:—*Held* that the above words were not of themselves evidence of actual malice. (d)

The question is not simply whether the act or fact stated is true or untrue, but whether the defendant had reason honestly to believe the act or fact to have been as he represented. (e)

When express malice is shown, by proving the libel false as well as malicious, the defendant may still make out a good defence, by shewing that he had good ground for believing the statement true, and acted honestly under that persuasion. (f)

Before it can become material for the jury to en-

(a) *Wason v. Walter*, L. R. 4 Q. B. 87, per Cockburn, C. J.

(b) *M'Cullough v. M'Intee*, 13 U. C. C. P., 441, per A. Wilson, J.

(c) *Spill v. Maule*, L. R. 4 Ex. 232.

(d) *Ib.*

(e) *M'Cullough v. M'Intee*, 13 U. C. C. P. 441, per A. Wilson, J.; *Harrison v. Bush*, 5 E. & B. 344.

(f) *M'Intyre v. M'Bean*, 13 U. C. Q. B. 534.

quire whether the defendant acted maliciously or not, the plaintiff must satisfy them that the defendant's statements are not true, and that he had no reasonable ground for believing them to be true. (a)

It is matter of law for the Judge to determine whether the occasion of writing or speaking criminary language, which would otherwise be actionable, repels the inference of malice, constituting what is called a *privileged communication*. If, at the close of the plaintiff's case, there is no intrinsic or extrinsic evidence of malice, it is the duty of the Judge to direct a nonsuit or verdict for the defendant, without leaving the question of malice to the jury.

But whenever there is evidence of malice, either extrinsic or intrinsic, in answer to the immunity claimed, by reason of the occasion, a question arises which the jury, and the jury alone, ought to determine. (b) But where there is no evidence of malice, the question whether the defendant believed his statements to be true should not be left to the jury, for it is only admissible on the question of malice or *bona fides* (c).

In *Shaver v. Linton*, the defendant being clerk of the peace, in a conversation with the Sheriff as to the medical examination of a lunatic in gaol, said he would not employ the plaintiff, as he had not the Governor's license, adding that he thought the Sheriff had more pluck than to ask him, after what he, the defendant, had written (referring to some article in a medical journal). On being applied to by one M., on the plaintiff's behalf, for an apology, he repeated that plaintiff was not a qualified

(a) *M'Intyre v. M'Bean*, 13 U. C. Q. B. 534.

(b) *Shaver v. Linton*, 22 U. C. Q. B. 183, per *Hagarty, J.*; *Cooke v. Wildes*, 5 E. & B. 340. See also *Poitevin v. Morgan*, 10 L. C. J. 99, per *Badgley, J.*; *Leiden v. A. E. Cotton Co.*, L. R. 4 Q. B. 262; *M'Intee v. M'Cullough*, 10 U. C. L. J. 238 (in E. & A.)

(c) *Ib.*

physician in Upper Canada, and could not legally practise here without the Governor's license, and it was held that both conversations were privileged, and that there being no intrinsic evidence of malice in either, and no extrinsic evidence thereof, in accordance with the above principles, there was nothing to leave to the jury.

In the same case, (a) the defendant published a letter, addressed to the editor of a public paper, in which he stated that the plaintiff was unlicensed, and it was held that the Judge might either have ruled this to be privileged, or, at all events, might have left it to the jury, with a strong caution as to usual liberty of discussion allowed in all matters of public interest, and with observations somewhat like those of *Sir William Erle*, in *Turnbull v. Bird*. (b)

These observations are, of course, a declaration of the law on the subject of publishing communications on matters affecting the public, and are as follows:—"The law is, that a man may publish defamatory matter of another holding any public employment, if it is a matter in which the public have any interest, within the limits I will lay down in accordance with decided cases. Every person has a right to comment on the acts of a public man which concern him as a subject of the realm, if he do not make his comments the vehicle of malice or slander. The rule is, that the comments are justified, provided the defendant honestly believed that they are fair and just. With that limitation, the law allows the publication."

In that case, he told the jury that if they were "of opinion that the defendant, in the comments he made, was guilty of any wilful misrepresentation of fact, either

(a) *Shaver v. Linton*.

(b) 2 F. & F. 508.

by the exaggeration of what actually existed, or by the partial *suppression* of what actually existed, so as to give it another colour, or if he made his comments with any misstatement of fact, which he must have known to be a misstatement, if he exercised ordinary care, then he loses his privilege, and the occasion does not justify the publication, which would then be actionable."

Upon the question whether an alleged libel is a privileged communication or not, the proper course at the trial is this:—The Judge is bound to ask the jury whether the matter was published *bona fide*. If they come to the conclusion that it was, then it is for the Judge to say whether, under all the circumstances, it is or is not a privileged communication. (a) It is wrong to leave to the jury whether an alleged libel is contained in an official document and privileged communication. (b)

In an action for libel, the evidence adduced at the trial, in proof of the libel, was, that the defendant, with some others, while at work in his field, were talking of prayer meetings. Upon being told that the plaintiff, and others, were going to hold the next prayer meeting at his house, he stated that he had no objection to the others, but would not allow the plaintiff to come; and, upon being pressed to state his reasons, said that the plaintiff had been guilty of bestiality. Upon being asked, on a second occasion, to withdraw his words, he refused, and said he was not mistaken, and would go and take his oath of it, if they liked to go down with him before the Magistrates. The learned Judge left the question of *bona fides* to the jury, directing them that, if the defendant, through mistake, *bona fide* believed what he stated, the occasion would justify the statement. The jury having found for the

(a) *Stace v. Griffith*, L. R. 2 P. C. App. 428, per *Ld. Chelmsford*.

(b) *Ib.*

plaintiff, upon motion for a new trial, the Court held that, there being intrinsic evidence for the Jury to decide upon, the case could not properly be withheld from their decision; second, that the question being whether the defendant honestly believed what he said to be true, not whether it was in fact true, the case was properly left to the jury, and their decision was final. (a)

This case was reversed in appeal, on the ground that the *bona fides* is made out when the privilege is ascertained. The truth of the words is assumed to support the privilege, and the defendant is not called upon to prove it. (b)

In some cases the presumption of privilege is altogether conclusive, and the law will not allow any evidence to be adduced to remove or impeach it. The regular and established proceedings in Parliament and in Courts of Justice are of this character, and no action for libel can be supported upon any part of their contents. The reasons given for this absolute privilege are, first, that the safety and welfare of the community requires that all such public proceedings should be perfectly unrestrained and free, and only subject to the authority and discretion of the tribunals in which they take place: second, that such tribunals possess the power of expunging all defamatory matters, if irrelevant from the proceedings, and of obliging the offending party to make satisfaction. (c)

When a communication is not absolutely privileged, it is a sufficient answer in point of law to say that it was malicious, and made without reasonable and probable cause. (d)

The defendant, hearing that a tradesman had been

(a) *M'Cullough v. M'Intee*, 13 U. C. C. P. 438.

(b) S. C. 10 U. C. L. J. 238, (in E. & A.)

(c) *Stanton v. Andrews*, 5 U. C. Q. B. O. S. 221, *et seq.*, per *Sherwood*, J.

(d) *Dawkins v. Ld. Paulet*, L. R. 5 Q. B. 101, per *Cockburn*, C. J.

hoaxed by a letter written in his name, and ordering a certain article, wrote to the tradesman a letter to the effect that, in his opinion, the letter was written by the plaintiff. It turned out that it was not; but the jury found that the defendant sincerely believed that it was: *Held* that, even if the letter was a libel, it was a privileged communication. (a)

The defendant having published in his newspaper a report read at a vestry meeting, containing a statement to the effect that certain returns of the plaintiff, a medical man, to the Registrar under the Statute, were wilfully false, such report not having been published by the vestry, held that the publication of it was not privileged. (b)

A churchwarden having written to the plaintiff, the incumbent, accusing him of having desecrated the church, by allowing books to be sold in it during service, and by turning the vestry room into a cooking apartment, the correspondence was published without the plaintiff's permission, in the defendant's newspaper, with comments on the plaintiff's conduct:—*Held* that this was a matter of public interest, which might be made the subject of public discussion, and that the publication was therefore not libellous, unless the language used was stronger than, in the opinion of the jury, the occasion justified. (c)

A charge against the plaintiff, of wrongfully taking the defendant's logs, sawing them into lumber, and selling it, was contained in a letter written by the defendant, to one M., an intimate friend of his, who was a near relative to the plaintiff, but in no way interested or concerned in

(a) *Croft v. Stevens*, 8 U. C. L. J. 280; 7 H. & N. 570.

(b) *Popham v. Pickburn*, 8 U. C. L. J. 335; 7 H. & N. 891; 31 L. J. (Ex.)

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(c) *Kelly v. Tinning*, L. R. 1 Q. B. 699; 35 L. J. (Q. B.) 231.



business with either party, with the avowed object of defendant's availing himself of M.'s influence and good offices in his controversies with the plaintiff, and to warn the plaintiff and his mother against the consequences of law suits, and the alleged interested motives of his attorney. M. being absent from the country, the letter was opened by his agents and relatives, and became public:—*Held* that this was not a privileged communication. (a)

It seems the 67th section of 32 & 33 Vic., c. 29, will apply to cases of libel. In *Hughes v. Dinorben*, (b) to prove that libels declared on were written by the defendant, certain documents, admitted to be in his handwriting, were used as standards of comparison. The plaintiff called several witnesses, and, to support and strengthen such evidence, he produced seven anonymous letters, generally relating to the same matters as the libels declared on. This evidence was admitted to prove malice, and the letters were also used as a comparison of the handwriting in dispute, and no objection was made by defendant's counsel:—*Held* that these seven anonymous letters were admissible—that they were relevant to the issue to shew malice; but that, if a proper objection had been made at the time of the trial, they could not have been received as evidence of handwriting.

Upon an indictment for libel, published at defendant's instance, in a newspaper, it appeared that the editor, who was not indicted, before inserting the libel, shewed it to the prosecutor, who did not express any wish to suppress the publication, but wrote a reply, which was also inserted:—*Held* not such a defence for the parties indicted as to render a conviction illegal. (c)

(a) *Connick v. Wilson*, 2 Kerr, 496; *Ib.* 617; and see *Andrews v. Wilson*, 3 Kerr, 86.

(b) 32 L. T. Rep. 271.

(c) *Reg. v. M'Elderry*, 19 U. C. Q. B. 168. See, as to justification, *Stewart v. Rowlands*, 14 U. C. C. P. 485; *Hill v. Hogg*, 4 Allen, 108.

On an application for criminal information for libel, the Court is placed in the position of a grand jury, and must have the same amount of information as would warrant a grand jury in returning a true bill. A grand jury would not be justified in returning a true bill unless the libel itself were laid before them. Therefore, the application for a criminal information must be rejected, unless the libel is filed with the affidavit on which the application is based. (a)

Under the Con. Stats. U. C., c. 103, a plea to an information for libel must allege the truth of *all* the matters charged. (b)

The use of the innuendo in an indictment for libel is to explain the evil meaning of the defendant when the words are apparently innocent and inoffensive, or ambiguous. The doctrine of taking words in their mildest sense is applied only when the words, in their natural import, are doubtful, and equally to be understood in one sense as in the other. (c) It is for the Court to say whether the innuendo is capable of bearing the meaning assigned by it, and for the jury to say whether that meaning was intended and proved. (d)

*Riot.*—This offence is defined to be a tumultuous disturbance of the peace, by *three persons or more* assembling together, of their own authority, with an intent mutually to assist one another against any who shall oppose them in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful. (e)

(a) *Ex parte Gugg*, 8 L. C. R. 353.

(b) *Reg. v. Moylan*, 19 U. C. Q. B. 521.

(c) *Somers v. House*, Holt 39.

(d) *Sturt v. Bragg*, 10 Q. B. 908; *Anonymous* 29 U. C. Q. B., 462, per Wilson, J.

(e) *Reg. v. Kelly*, 6 U. C. C. P. 372, per Draper, C. J.

The difference between a riot and an unlawful assembly is this: the former is a tumultuous meeting of persons, upon some purpose which they *actually execute* with violence, and the latter is a *mere assembly* of persons, upon a purpose which, if executed, would make them rioters, but which they *do not execute*, nor *make any motion* to execute. (a)

There is also an offence of a similar character, called a *roul*. This offence is distinguishable from an unlawful assembly in this, that the parties actually make a *motion* to *execute* the purpose which, if executed, would make them rioters. (b)

The case of *Reg v. Kelly* (c) fully maintains the distinction between a riot and unlawful assembly. In this case, the defendant was indicted for riot and assault, and the jury found him guilty of a riot, but not of the assault charged:—*Held* that a conviction for riot could not be sustained, for the assault, the object of the riotous assembly, had not been executed, but that the defendant might have been found guilty of forming part of an unlawful assembly. (d) It was considered that the assault was the enterprise of a private nature, in the words of the definition of riot, and that it must be afterwards actually executed with violence to constitute the offence.

It may be observed generally that all the parts of this definition must be satisfied, in evidence, before the jury can convict of riot. Three persons, or more, must be engaged therein; (e) it must relate to some *private quarrel*, only; for the proceedings of a riotous assembly, on a public and general account, may amount to overt acts of high

(a) *Reg. v. Kelly*, 6 U. C. C. P. 372; *Rex v. Birt*, 5 C. & P. 154.

(b) See *Russ. Cr.* 387; *Reg. v. Vincent*, 9 C. & P. 91.

(c) *Supra*.

(d) *Ib.*

(e) *R. v. Scott*, 3 Burr, 1262; 1 W. Bl. 291; *R. v. Sadbury*, 1 Ld. Raym 484; Salk, 593; Arch. Cr. Pldg. 841.

reason, by levying war against the Queen. (a) The offence must also be accompanied with some such circumstances either of actual force or violence, or, at least, of an apparent tendency thereto, as are naturally calculated to inspire people with terror, such as carrying arms, using threatening speeches, turbulent gestures, etc. (b)

But it is not necessary that personal violence should have been committed. (c) It is sufficient terror and alarm to sustain the indictment if *any one* of the Queen's subjects be in fact terrified. (d)

To some extent it is necessary that there should be a predetermined purpose of acting with violence and tumult; and if parties met together on a lawful and innocent occasion, become involved in a sudden affray, none are guilty but those who actually engage in it, for the breach of the peace was not part of their original purpose. (e) But it seems to be immaterial whether the act intended to be done by the persons assembling be in itself lawful or unlawful. (f)

Where a riot is proved to have taken place, the mere presence of a person among the rioters, even although he possessed the power of stopping the riot, and refused to exercise it, does not render him liable as one of the rioters. (g) In order to render him so liable, it must be shewn that he did something, by word or act, to take part in, help, or incite the riotous proceeding. (h) It is not necessary to constitute a riot that the Riot Act (i) should be read. Before the proclamation can be read, a riot

(a) Russ. Cr. 379.

(b) *R. v. Hughes*, 4 C & P. 373; Arch. Cr. Pldg. 842.

(c) *Clifford v. Brandon*, 2 Camp. 369, per *Mansfield*, C. J.; Russ. Cr. 379.

(d) *R. v. Phillips*, 2 Mood. C. C. 252; C. & Mar. 602; Arch. Cr. Pldg. 842.

(e) Russ. Cr. 381.

(f) *Ib.* 380.

(g) *Reg. v. Atkinson*, 11 Cox, 330, per *Kelly*, C. B.

(h) *Ib.*

(i) 31 Vic., c. 70.

must exist, and the effect of the proclamation will not change the character of the meeting, but will make those guilty of felony who do not disperse within an hour after the proclamation is read. (a)

An assemblage of persons to witness a prize fight is an unlawful assembly, and every one present and countenancing the fight is guilty of an offence. (b)

By the common law, every private individual may lawfully endeavour, of his own authority, and without any warrant or sanction from a Magistrate, to suppress a riot, by every means in his power. He may disperse, or assist in dispersing, those assembled, and stay those engaged in it from executing their purpose, as well as stop and prevent others whom he may see coming up from joining the rest. It is his bounden duty to do this, and even to arm himself, in order to preserve the peace, if the riot be general and dangerous. If the occasion demands immediate action, and no opportunity is given for procuring the advice or sanction of a Magistrate, it is the duty of every subject to act for himself, and upon his own responsibility, in suppressing a riotous and tumultuous assembly, and the law will protect him in all that he honestly does in prosecution of this purpose. (c) This power and duty devolve upon a Governor of a colony, as well as others, in case of riot and rebellion. (d) By the 31 Vic., c. 70, s. 5, persons suppressing a riot are justified, though the death of a rioter may ensue. This is now the governing enactment as to riots throughout the Dominion.

*Forcible Entry or Detainer.*—This offence is committed by violently taking or keeping possession of lands and

(a) *R. v. Furzey*, 6 C. & P. 81.

(b) *R. v. Bellingham*, 2 C. & P. 234; *R. v. Perkins*, 4 C. & P. 537; Arch. Cr. Pldg. 842-3.

(c) *Phillips v. Eyre*, L. R. 6 Q. B. 15, per Willes, J.

(d) *Ib.*

tenements with menaces, force, and arms, and without the authority of the law. (a) It is a misdemeanor at common law, and there is no doubt an indictment will lie at common law for a forcible entry, if accompanied by such circumstances as amount to more than a bare trespass, and constitute a public breach of the peace. (b)

The object of prosecutions for forcible entry is to repress high-handed efforts of parties to right themselves; (c) and there seems now no doubt that a party may be guilty of a forcible entry by violently and with force entering into that to which he has a legal title. (d)

The Stats. 8 Hy. 4, c. 9, 8 Hy. 6, c. 9, 6 Hy. 8, c. 9, and 21 Jac. 1, c. 15, as to forcible entries, seem to be in force in this country. (e)

Under these Statutes, the party aggrieved by a forcible entry and detainer, or a forcible detainer, may proceed by complaint made to a local Justice of the Peace, who will summon a jury, and call the defendant before him, and examine witnesses on both sides if offered, and have the matter tried by the jury. (f) The party may, however, also proceed by action or by indictment at the General Sessions. (g) And if a forcible entry or detainer be made by three persons, or more, it is also a riot, and may be proceeded against as such, if no enquiry has before been made of the force. (h)

It has been held that the private prosecutor, on an indictment for forcible entry or detainer, cannot be examined as a witness, if the Court may order restitu-

(a) Russ. Cr. 421.

(b) *R. v. Wilson*, 8 T. R. 357; *R. v. Baks*, 3 Burr, 1731; Arch. Cr. Pldg. 851.

(c) *Reg. v. Connor*, 2 U. C. P. R. 140, per *Robinson*, C. J.

(d) *Newton v. Harland*, 1 M. & Gr. 644; *Butcher v. Butcher*, 7 B. & C. 399; 1 M. & R. 220; *Hillary v. Gay*, 6 C. & P. 248; Russ. Cr. 421-2.

(e) *Ante* p. 22.

(f) *Borwell and Loyd*, 13 L. C. R. 10 per *Maguire*, J.

(g) Russ. Cr. 428.

(h) *Ib.*

tion. (a) As this disability, however, rests solely on the ground of interest, it is, no doubt, removed in Ontario, at least, by the Con. Stats. U. C. C., 32, and the (Ont.) 33 Vic., c. 13. If, since the forcible entry, the prosecutor has been restored to possession, he may be a witness. (b)

An inquisition taken before a Justice is bad if it appears to the Court that the defendant had no notice, or that any of the jury had not lands or tenements to the value of forty shillings, for the 8 Hy. 4, c. 9, expressly requires that persons who are to pass on such an inquisition should have lands of that value. (c) The notice is not required by the 8 Hy. 6, c. 9, but the uniform course of criminal proceedings makes it necessary that, before a person shall be found a criminal, he shall be called upon to make defence; and, in addition to this principle, the Courts have recognized the propriety of notice in this proceeding, on the ground that it would be wrong to put a person out of possession of his house or land upon a complaint of which he has no knowledge. (d)

On an indictment for forcible entry or detainer of land, evidence of title in the defendant is not admissible (e) Where the defendants applied for delay, in order to give evidence of title, but on the prosecutor consenting to waive restitution in the event of conviction, they were compelled to go to trial, and were convicted, a writ of restitution was afterwards refused, though, *semble*, it would, in any case, have been improper to delay the trial for the reason urged. (f)

An inquisition for a forcible entry, taken under 6 Hy. 8, c. 9, must shew what estate the party expelled had in

(a) *Reg. v. Hughson*, Rob. Dig. 124; *R. v. Beavan*, Ry. & M. 242; *R. v. Williams*, 4 Man. & R. 471; 9 B. & C. 549.

(b) *Reg. v. Hughson*, *supra*.

(c) *Rex v. M'Kreavy*, 5 U. C. Q. B. O. S. 620.

(d) *Ib.* 626, per *Robinson*, C. J.

(e) *Reg. v. Cokely*, 13 U. C. Q. B. 521.

(f) *Reg. v. Connor*, 2 U. C. P. R. 139.

the premises, and if it do not, the inquisition will be quashed, and the Court will order restitution. (a)

The 8 Hy. 6, c. 9, was construed to authorize restitution only in cases where the person expelled was seized of an estate of inheritance. The 21 Jac. 1, c. 15, extends the remedy to a tenant for years; and, in the opinion of Lord Coke, the latter Statute will apply to a tenant for a term less than a year. (b) When the inquisition, finding a forcible entry is quashed, the Court, upon the prayer of the party dispossessed under the Justices' writ, must award a writ of restitution to place him in possession. (c)

It was formerly held that where the prosecutor had been examined as a witness, restitution should not be granted. (d) This was because the evidence Act, 16 Vic., c. 19, excluded any claimant or tenant of premises sought to be recovered in ejectment. The late Act does not affect criminal proceedings, so that the decision will still, perhaps, hold in Ontario. On an indictment for forcible entry, containing two counts, one at common law and the other under the Statutes, the prosecutor alleging that he had a term of years in the land, there was a general verdict of guilty; a writ of restitution was refused, it appearing that the lease of the land had expired. (e) Restitution cannot be awarded to one who never was in possession, or one who never has been dispossessed. (f)

The Court of Queen's Bench had at common law no jurisdiction to issue a writ of restitution, except as part of the judgment on an appeal of larceny. (g) But, by an equitable construction of the Statutes, it has now a discretionary power to grant a writ of restitution. (h)

(a) *Mitchell v. Thompson*, 5 U. C. Q. B. O. S. 620.

(b) *Rex v. M'Creary*, 625, per *Robinson*, C. J.

(c) *Ib.* 626, per *Robinson*, C. J.

(d) *Reg. v. Connor*, 2 U. C. P. R. 139.

(e) *Rex v. Jackson*, *Draper*, 53.

(f) *Boswell and Loyd*, 13 L. C. R. 11, per *Maguire*, J.

(g) *Reg. v. Ld. Mayor London*, L. R. 4 Q. B. 371.

(h) *Mitchell v. Thompson*, 5 U. C. Q. B. O. S. 628, per *Robinson*, C. J.



Where the defendant, having been convicted at the Quarter Sessions on an indictment for forcible entry was fined; but that Court refused to order a writ of restitution, and the case was removed into the Queen's Bench by *certiorari*, and a rule obtained to shew cause why a writ of restitution should not be issued:—*Held* that it was in the discretion of this Court either to grant or refuse the writ; and, under the circumstances, the verdict being against the charge of the learned chairman, and he having declined to grant the writ, and the prosecutor's case not being favoured, it was refused. (a)

The Court of General Sessions, where the indictment is found, may, before trial, award a writ of restitution; but it is entirely in the discretion of the Court to grant or refuse such writ. (b)

But a Justice *out* of Sessions cannot award restitution on an indictment of forcible entry, or forcible detainer, found before him by the grand jury, at the Sessions. He can only do so if seized of the case out of Sessions, and after enquiry before a jury, on a regular inquisition. The statement that the Justices *in* Court, or out of Court, may award a writ of restitution only holds to the extent above-mentioned. (c)

If an indictment is brought at common law for a forcible entry, it is only necessary to state the bare possession of the prosecutor; but in such case no restitution follows the conviction. (d)

A mere trespass will not support an indictment for forcible entry. There must be such force, or show of force, as is calculated to prevent resistance. (e) But where the defendant, and persons with him, having entered a

(a) *Reg. v. Wightman*, 29 U. C. Q. B. 211.

(b) *Boswell and Loyd*, 13 L. C. R. 6.

(c) *Ib.*

(d) *Rex v. M'Kreavy*, 5 U. C. Q. B. O. S. 629, per Sherwood, J.

(e) *Rex v. Smyth*, 1 M. & Rob. 155; 5 C. & P. 201.

dwelling-house through an open door, and one of the persons having been seen to push out the windows, the defendant himself taking them off the hinges, it was held that a conviction for forcible entry should not be disturbed. (a)

A wife may be guilty of a forcible entry into the dwelling-house of her husband, and other persons also, if they assist her in the force, although her entry, in itself, is lawful. (b)

*Nuisances.*—It has been said there are three kinds of nuisances—namely, public, common, and private. (c)

To constitute a public nuisance, the thing complained of must be such as, in its nature or its consequences, is a nuisance, an injury or damage to all persons who come within the sphere of its operation, though it may be in greater or less degree. (d)

Throwing noxious matter into Lake Ontario, or any other public navigable water, is a public nuisance, and the person guilty thereof is liable to an indictment for committing a public nuisance, or to a private action, at the suit of any individual *distinctly* and peculiarly injured. (e) So obstructions to navigable rivers are public nuisances (f) So if one person has a mill, by prescription, in his soil, and another erects a mill upon his soil, by which the stream to the mill of the former is straitened or stopped, or by which too great a quantity of water runs thereto, so that the mill is endangered, and cannot grind as much as it was wont, this is a nuisance to the mill. (g)

The collection of a crowd of noisy and disorderly

(a) *Reg. v. Martin*, 10 L. C. R. 435.

(b) *Rex. v. Smyth*, 1 M. & Rob. 155; Arch. Cr. Pldg. 849.

(c) *Little v. Ince*, 3 U. C. C. P., 545, per Macaulay, C. J.

(d) *Ib*; *Reg. v. Meyers*, 3 U. C. C. P. 333, per Macaulay, C. J.

(e) *Watson v. City Toronto Gas and Water Co.*, 4 U. C. Q. B. 158.

(f) *Brown and Gugg*, 14 L. C. R. 213.

(g) *Mills v. Dixon*, 4 U. C. C. P. 227, per Macaulay, C. J.

people, to the annoyance of the neighbourhood, or outside grounds, in which entertainments with music and fireworks are given, for profit, is a nuisance, for which the giver of the entertainment is liable to an injunction, even although he has excluded all improper characters from the grounds, and the amusements within the grounds have been conducted in an orderly way, to the satisfaction of the police. (a)

It seems that a person who is annoyed by the noise of horses kicking in a stable contiguous to his dwelling, and by the stench from the manure, etc., cannot maintain an indictment to remove it. (b)

All disorderly houses are public nuisances, and may be indicted. (c) Where the defendants, as master and mistress resided in a house to which men and women resorted for the purpose of prostitution, but no indecency or disorderly conduct was perceptible from the exterior of the house:—*Held* that the defendants were guilty of keeping a disorderly house. (d) But a conviction, under the 32 & 33 Vic., c. 32, for keeping a house of ill fame, or being an inmate of such a house, adjudicating that the accused should pay a fine of \$50 forthwith, and be imprisoned for three months, unless the fine be sooner paid, is not warranted by s. 17 of the Statute, for imprisonment is only authorized by the Act, when it has been awarded as a substantive punishment. (e)

It would seem that though a Magistrate may have a general jurisdiction to hear any complaint against a disorderly inn or house, he has no right to issue a warrant to arrest a casual guest, quietly visiting a licensed tavern as a guest, at a time subsequent to the charge, and in no

(a) *Walker v. Brewster*, L. R. 5 Eq. 25.

(b) *Lawrason v. Paul*, 11 U. C. Q. B. 537, per *Robinson*, C. J.

(c) *Russ*, Cr. 442.

(d) *Reg. v. Rice*, L. R. 1 C. C. R. 21; 35 L. J. (M. C.) 93.

(e) *Re Slater*, 9 U. C. L. J. 21.

way present at or assisting in any disturbance or disorder, and this though the information charges the house to be a common disorderly ill-governed house, and a common nuisance in the neighbourhood, and the warrant is to apprehend the keeper thereof, and all others found therein. (a)

In general, all open lewdness, grossly scandalous, is indictable at common law, and it appears to be an established principle that whatever openly outrages decency, and is injurious to public morals, is a misdemeanor. (b)

The prisoners were convicted of indecently exposing their persons in a urinal, open to the public, which stood on a public footpath in Hyde Park, and the entrance to which was from the footpath:—*Held* that the jury might well find the urinal to be a public place, and that, therefore, the conviction was good. (c)

By the 10 & 11 Wm. 3, c. 17, all lotteries are declared to be public nuisances. (d) Where one hundred and forty-nine lots of land were sold by lottery, the person getting No. 1 ticket to have the first choice:—*Held* that this was a lottery, though it did not appear there was any difference in the value of the lots. The lottery consisted in having a choice of the lots, and that choice was to be determined by chance. (e) A sale of land by lot, in which there are two prizes, comes within the Imp. Stat. 12 Geo. 2, c. 28. (f)

So the non-repair of a highway, or the obstruction thereof, is a nuisance, indictable at common law. (g)

A dam erected on a stream, without a proper apron or slide, in accordance with the 12 Vic., c. 87, is such a

(a) *Cleland v. Robinson*, 11 U. C. C. P. 421, per *Hagarty*, J.

(b) *Russ*, Cr. 449.

(c) *Reg. v. Harris*, L. R. 1, C. C. R. 282.

(d) *Cronyn v. Widder*, 16 U. C. Q. B. 361, per *Robinson*, C. J.

(e) *Power v. Canniff*, 18 U. C. Q. B. 403.

(f) *Marshall v. Platt*, 8 U. C. C. P. 189.

(g) *Reg. v. Corporation Paris*, 12 U. C. C. P. 450, per *Draper*, C. J.

private nuisance to the owners of saw logs ready to **pass**, but prevented from passing thereby, as may be **abated** by them. (a)

The proper remedy for a public nuisance is by **indictment**. And where an obstruction of a navigable river is an injury common to all the Queen's subjects who **have** occasion to use the stream, and is, consequently, a **public nuisance**, a person sustaining no actual particular **damage** cannot maintain an action therefor, but the proper remedy is by indictment. (b)

An indictment is the proper remedy in all cases, **except** when a charter, which is assumed to be a contract between the parties obtaining it and the public that the road will be constructed, has been obtained to construct the road, and the work has never been done, in which latter case the proper remedy is *mandamus*.

A *mandamus nisi* having issued to compel a municipal corporation to repair and build a bridge, it appeared, on the return, that the liability was disputed on several grounds, it being contended that the bridge did not belong to the defendants, that it was not constructed on the site provided by the charter of the original company which built it, and was in an unfit and dangerous place, and that it should be repaired by another municipality : —*Held* that, under these circumstances, a *mandamus* would not lie, and that the applicants must proceed by indictment. (c)

The circumstance that the thing complained of furnishes, on the whole, a greater convenience to the public than it takes away, is no answer to an indictment for a nuisance. (d) As to highways, the test, irrespective of

(a) *Little v. Ince*, 3 U. C. C. P. 545-6.

(b) *Small v. G. T. R. Co.* 15 U. C. Q. B. 283.

(c) *Reg. v. Corporation Haldimand*, 20 U. C. Q. B. 574.

(d) *Reg. v. Bruce*, 10 L. C. R. 117; *Reg. v. Meyers*, 3 U. C. C. P. 323, per *Macaulay*, C. J.; *R. v. Ward*, 4 A. & E. 384, 6 Nev. & M. 38.

the balancing of the advantages against the impediments, is, whether the obstruction is prejudicial to the public to a degree amounting to a nuisance in fact, that is, directly, however beneficial collaterally. (a) Though a nuisance is erected before any person comes to live on or near the place, this does not prevent them complaining of it, on afterwards coming there. (b)

In addition to the remedy by indictment, a nuisance may, in certain cases, be abated by the parties affected thereby, and this whether the nuisance is public or private, and though on the soil of another. (c) But a private individual cannot abate a public nuisance, unless by reason of some special inconvenience or prejudice to himself, or an occasion to require and justify it. (d) A boom stretched across a floatable stream or river, in a place having relation to public lands, is a public nuisance, and, as such, may be abated by any person, notwithstanding Con Stats. Can., c. 23, s. 13, for the latter only respects booms having reference to public lands. (e)

The defendant was convicted by a jury of a nuisance in keeping in a building an excessive quantity of gunpowder. Having failed to establish at the trial that he had abated and prostrated the nuisance, the Court thereupon adjudged that he should pay to Her Majesty £50, and be imprisoned until the fine was paid, and ordered the Sheriff forthwith to abate the nuisance, by the immediate destruction of the powder. (f)

Where the defendant neglects to abate the nuisance, the Court will compel its abatement through the Sheriff.

(a) *Reg. v. Meyers*, 3 U. C. C. P. 323, per *Macaulay*, C. J.; and see *Rowe v. Titus*, 1 Allen, 326.

(b) *Reg. v. Brewster*, 8 U. C. C. P. 208.

(c) *Little v. Ince*, 3 U. C. C. P. 545, per *Macaulay*, C. J.

(d) *Ib.* 545, per *Macaulay*, C. J.; and see *Dimes v. Petley*, 15 Q. B. 276; *Reg. v. Meyers*, *supra*, 333, per *Macaulay*, C. J.

(e) *Reg. v. Patton*, 13 L. C. R. 311.

(f) *Reg. v. Dunlop*, 11 L. C. J. 186.

An indictment had been preferred against the defendant, in a previous term, for a public nuisance, and judgment obtained ordering its abatement, the Court, on an affidavit that the nuisance had not been abated, made a rule absolute for a precept to the Sheriff to abate the nuisance. (a)

A party is liable to fresh actions for continuing a nuisance. (b) And it may be generally stated that when a person is liable to an action for a nuisance, he may also be indicted. (c)

There seems to be no authority for a Justice convicting a party summarily of a nuisance, and fining for the offence. (d) A conviction by a Magistrate for obstructing a highway, and order to pay a continuing fine until the removal of such obstruction, was held bad, as unwarranted by any Act of Parliament. (e)

Twenty years' user will not legitimate a public nuisance. (f) The maxim that no length of time will legalize such nuisance generally holds; (g) but as applied to a question of dedication, equivocal in itself, after a lapse of thirty years, without any public enjoyment, before or after suit, it forms a proper subject to be taken into consideration. (h)

Highways exist both by land and water. In Ontario, those by land have accrued to the public by dedication of the Crown, in what is commonly termed allowances for roads in the original survey of towns and townships; or by dedication of private individuals, or under the provisions of the Statute Law, or by usurpation and long

(a) *Reg. v. Hendry*, 1 James, 105.

(b) *Drew v. Baby*, 6 U. C. Q. B. O. S. 240, per *Robinson*, C. J.

(c) *Rex v. Pedley*, 1 A. & E. 822; *Reg. v. Stephens*, L. R. 1 Q. B. 702. 35 L. J. (Q. B.) 251.

(d) *Bross v. Huber*, 18 U. C. Q. B. 286, per *Robinson*, C. J.

(e) *Reg. v. Huber*, 15 U. C. Q. B. 589.

(f) *Reg. v. Brewster*, 8 U. C. C. P. 208.

(g) See *R. v. Cross*, 3 Camp. 227; 4 Bing. N. C. 183.

(h) *Rex v. Allan*, 2 U. C. Q. B. O. S. 105, per *Macaulay*, C. J.

enjoyment. Upon land, therefore, highways are established only by some positive act, indicating the object and its accomplishment. They are, it may be said, artificially made, or only become such by acts in *pais*. It is otherwise with navigable rivers and watercourses. They are *natural* highways, pre-existing and coeval with the first occupancy of the soil, and formed, practically, the first or original highways, in point of actual use. (a)

In the year 1826, the original town plot of London was surveyed under instructions from the Crown, and the plan of such survey, with the field notes, shewed that two of the streets, for obstructing portions of which the defendant was indicted, were extended to within four rods of the river Thames, which runs through that town. The overseer of highways for the years 1829, 1830, 1831, stated that he had traced the streets in question all through; that the posts were there; that he opened the streets by the posts; that there was a road reserved four rods along the river bank; that one of the streets ran down to the river, and the posts were then four rods from the river when he opened that street.

In 1832, one R. was duly instructed to survey a mill site in the town, and to lay off for the purchaser such ground as might be necessary, and he thereupon ran a line which crossed these two streets as designated upon the original plan, and cut off portions of several town lots laid out upon this plan.

In 1839, a mill site was sold by the Crown land agent to one B. (under whom the defendant claimed), not according to R.'s survey, but according to a small plan obtained from the original surveyor; and the patent, which issued in 1846, appeared to grant the land designated on this plan, making no reservation of streets, but including

(a) *Reg. v. Meyers*, 3 U. C. C. P. 352, per *Macaulay*, C. J.



the extensions to the river of the streets in question, as laid out upon the original plan.

Previously, also, to this sale, lots had been sold on these streets by the proper authorities; the streets had been worked and improved, and one in particular was open to the river, and the other as far as where the obstruction stood.

*Held*, affirming the judgment of the Court of Common Pleas (*a*), that the evidence conclusively established that the streets in question had been laid out in the original survey of the town to within four rods of the river, and that this space was left open for public use; that the existence of these streets as public highways was shewn by the work on the ground at the original survey, and by the adoption, on the part of the Crown, of that work as exhibited on the plan thereof returned, which adoption was established by the disposition of lands according to that plan and survey; that thereby these streets became public highways; and although, prior to such adoption, the Crown would not have been bound by either plan or survey, after such adoption there was no power of making such an alteration as would be necessary to establish the defence set up. (*b*)

Where, for a period of more than twenty years, there had been travelled roads through the Humber plains in the Township of Etobicoke, not laid out by any proper authority, but used by the public at pleasure, owing to the original allowances not having been opened. They were irregular in their direction, and varied, at times, in their course. On the 31st March, 1835, seven hundred acres, including the defendant's lot, "with allowances for roads, as left by the survey of Deputy-Surveyor Hawkins,

(*a*) 16 U. C. C. P. 145.

(*b*) *Reg. v. Hunt*, 17 U. C. C. P. 443 (in E. & A.)

and all other roads now travelled," were granted to trustees for Christ Church, *Mimico*, and subsequently transferred by them to the Rector, under whom defendant held. One of such roads crossed defendant's land. It was proved that, during two years, statute labour had been performed upon it, and that it had been travelled for nearly fifty years. When the regular allowances were opened, defendant obstructed this road, and it appeared that other similar roads in the neighbourhood had been closed in the same manner:—*Held* that the road could not be considered a highway, for the evidence shewed not a perpetual dedication, but at most a permission to use until the proper allowance was opened, when, if not before, the defendant had a right to close it. (2) That it was not a highway under the 29 & 30 Vic., c. 51, s. 315, for it could not be said that statute labour had been "usually performed" upon it; and as it was, in fact, only a substitute for the regular allowance, it might fairly be treated as "altered" within the spirit of that clause when the allowance was open. (3) That no right by dedication could have been gained by the public while the fee remained in the Crown, and the permission of the Rector for the time being, or his tenants, could not bind his successors. (a)

The 315th clause of the 29 & 30 Vic., c. 51, cannot be taken to mean that every bye road or short cut used by the Indians across the plains or flats is to be established as a permanent highway. It only means that roads which, under the provisions of that Act, are to acquire the character of legal highways, should have that same legal character where they passed through Indian lands, as in other parts of their course, although they might not be public allowances made in any original survey,

(a) *Reg. v. Plunkett*, 21 U. C. Q. B. 536.

nor had any public money been expended, or statute labour performed on them. (a)

Where the defendant was convicted on an indictment charging him with having obstructed a "highway," on evidence which, as reported to the Court, did not shew that the alleged highway had been established by a plan, filed or signed by the owners of the adjoining lots, or by the general user of the public, it having been used by one or two persons only for a short time, or that any clearly defined portion of land had been marked off and used; but there appeared to have been merely an open space, not bounded by posts or fences, over which the owners of the adjoining land had been in the habit of passing in the carriage of goods, wood, etc., to the rear of the premises:—*Held*, that there was not sufficient evidence to support the conviction, and it was, therefore, quashed. (b)

The roads of joint-stock companies are not public roads or highways, within the meaning of 22 Vic., c. 54, s. 336. (c)

Under Con. Stats. U. C., c. 54, s. 313, the fact of the Government surveyor having laid out a road in his plan of the original survey, would make it a highway, unless there was evidence of his work on the ground clearly inconsistent with such plan. (d)

A public road, laid out in the original survey of Crown lands, by a duly authorized Crown surveyor, is a public highway, though not laid out upon the ground.

After a road has once acquired the legal character of a highway, it is not in the power of the Crown, by grant of the soil, and freehold thereof, to a private person, to defeat the public of their right to use the road. (e)

(a) *Byrnes v. Bown*, 8 U. C. Q. B. 181.

(b) *Reg. v. Ouellette*, 15 U. C. C. P. 260.

(c) *Reg. v. Brown and Street*, 13 U. C. C. P. 356.

(d) *Carrick v. Johnston*, 26 U. C. Q. B. 69.

(e) *Reg. v. Hunt*, 16 U. C. C. P. 145.

The defendant being indicted for overflowing a highway with water, by means of a mill dam maintained by him, objected that there was no highway, and could be no conviction, because the road overflowed, which was an original allowance, had been in some places enclosed and cultivated. It was used, however, at other points, and those who had enclosed it were anxious that it should be opened and travelled, which, they said, was impossible, owing to the overflow. The overflow was at other parts than those so enclosed:—*Held* that the conviction was clearly right, and the 335th section of the 29 & 30 Vic., c. 51, did not apply, because no other road had been in use in lieu of the proper allowance, nor had any road been established by law in lieu thereof. (a)

The original public allowances for road made in the first survey of a township continued to be public highways, notwithstanding a new road deviating from any such allowance might have been opened under the provisions of the Statute 50 Geo. 3, c. 1, or might have been confirmed as a highway by reason of statute labour or public money having been applied upon it. (b)

Where, in the original plan of a township, a piece of ground was laid out as a highway, which was subsequently granted by the Crown, in fee, to several individuals, and was occupied by them, and others claiming under them, for upwards of thirty years, and never had been used as a highway:—*Held* that an indictment for a nuisance for stopping up that piece of ground, claiming it as a highway, could not be sustained. (c)

An indictment for obstructing a highway, laid out under 50 Geo. 3, c. 1, could not be supported when the highway had not been established in the manner marked out

(a) *Reg. v. Lees*, 29 U. C. Q. B. 221.

(b) *Spalding v. Rogers*, 1 U. C. Q. B. 269.

(c) *Rez v. Allan*, 2 U. C. Q. B. O. S. 90.

by that Statute, and could not, therefore, be considered as a public highway. And *semble*, in such a case, all the steps necessary to be taken before a highway could be legally established under that Act should be proved by the prosecutor to have been taken before the defendant could be found guilty. (a)

Where the Crown granted a lot of land on the bank of Lake Ontario, and along the bank of the lake, and to Lake Ontario, it was held that the Crown had power to grant the beach up to high water mark ; and in this case the grant being to a private individual, and having conveyed to him the land to the water of the lake, there was no common or public highway along the beach. (b) The actual sea shore may be granted by the Crown, and then there is no highway over it ; and even when ungranted, unless by dedication, there is no highway against the will of the Crown. It would seem that in grants of land in our waters having a river or lake boundary, the grant extends to the water, and there is no place between the land conceded and the water on which to place the highway. (c)

A Government survey will prevail in establishing a highway against the right of a party in possession, to whom a patent afterwards issues. (d)

A highway, of which the origin was not clear, had been travelled for forty years across the plaintiff's lot, the patent for which was issued in 1836. The municipality, in 1866, passed a by-law shutting up the road ; but no conveyance was ever made to the plaintiff:—*Held* that the user for thirty years after the patent would be conclusive evidence of a dedication against the owner, and

(a) *Rex v. Sanderson*, 3 U. C. Q. B. O. S. 103.

(b) *Parker v. Elliott*, 1 U. C. C. P. 470.

(c) *Parker v. Elliott*, *supra*, 490, per *Sullivan*, J.

(d) *Mountjoy v. Reg.* 10 U. C. L. J. 122.

that such evidence was equivalent to a laying out by him, so that the road, under Con. Stat. U. C., c. 54, s. 336, was vested in the municipality. (a)

Under 4 & 5 Vic., c. 10, the District Council could not open a new road, except by by-law; and where, therefore, no by-law was shewn:—*Held* that the road was not sufficiently established, and upon the evidence there was nothing to shew dedication. (b)

A dedication of land to the public use takes effect from the *intention* of the person making it; and merely opening or widening a street, for the convenience of the person doing it, or leaving land open where it is immediately adjacent to a highway, and permitting the public to use it, will not constitute a dedication. (c)

A being owner of a large tract of land, laid out a plot for a town at the mouth of the river B., upon the map of which town a road was marked off, leading along the edge of the river, to its mouth. The road was made originally at the expense of A., but afterwards repaired and improved by statute labour and public money, and holes filled up in the part upon which the obstruction complained of was erected. After indictment, and verdict of guilty, it was held that there was sufficient evidence of intention to dedicate the street by the plan, by user and the declaration of the owner to establish a dedication, and that the verdict of guilty was in accordance with the evidence. (d)

One H. owned a block of land fronting on Elizabeth Street, in Toronto, and running back to the centre of the block, between Elizabeth and Teraulay Streets. In laying out the land, he ran a street or lane of forty feet from

(a) *Mytton v. Duck*, 26 U. C. Q. B. 61.

(b) *Reg. v. Rankin*, 16 U. C. Q. B. 304.

(c) *Belford v. Haynes*, 7 U. C. Q. B. 464.

(d) *Reg. v. Gordon*, 6 U. C. C. P. 213.

Elizabeth Street to the limit of his own property, which was not enclosed or separated from the land adjoining. A short time after, and about seventeen years before the finding of the indictment, M., the owner of the adjoining land to the east, fronting on Teraulay Street, erected a fence to enclose his own land, running across the head of the lane. H. had nothing to do with the putting up of this fence, and there was no concert between him and M. as to the plan of survey, or the laying out of their respective properties. G., owning land bought from M., abutting on the head of the lane, threw down the fence, so as to make a thoroughfare to his own premises. The defendants, occupying lots in the lane, purchased from H., and contending that G. had no right to convert the lane into a thoroughfare to his own lot, re-erected the fence a few inches west of that pulled down, and thereupon G. procured them to be indicted for nuisance, in obstructing a public highway. A verdict of guilty was directed, subject to the opinion of the Court, on the facts above stated:—*Held* that the jury should have been directed to find whether the lane, when first laid out, was dedicated by H. to the public as a highway generally, or whether, with reference to the Statute 13 & 14 Vic., c. 15, s. 1, there was an express reservation of any right by him. (a)

In order to prove that a way was, in fact, public, evidence was given of acts of user extending over nearly seventy years, but during the whole period the land crossed by the way had been in lease. The Judge told the jury that they were at liberty, if they thought proper, to presume from these acts a dedication of the way by the defendant, or his ancestors, at a time anterior to the land being leased:—*Held* a proper direction. (b)

(a) *Reg. v. Spence*, 11 U. C. Q. B. 31.

(b) *Winterbottom v. Lord Derby*, L. R. 2 Ex. 316.

A public highway may be established in this country by dedication and user; but if the question arises between the public and the owner of the land, in a newly settled part of the country, stronger evidence may be required than in a more settled and populous neighbourhood. Land was granted to the Corporation of St. John, in 1785, reserving a right to the Crown to enter on the land at any time, and erect barracks, batteries, etc. :—*Held* that this did not prevent the Corporation from dedicating a part of the land to the public for a highway, and that neither the running of lines across the land by officers of the Engineers, in 1816 and 1818, without proof of their instructions, nor the subsequent erection of a gate across the road, and occasionally closing the same, was sufficient evidence of the exercise of the reservation to vest the exclusive right to the land in the Crown, the road having, from that period, been constantly used by the public, and by the military only as a road. (a)

Dedication of a road to the public may be presumed from long user, and the expenditure of statute labour on the road; and a party may be convicted under the Act 5 Wm. 4, c. 2, s. 16, for encroaching upon such a road, as well as upon highways duly laid out under the Act. (b)

There may, in certain cases, be a limited or partial dedication of a road by the public. The plaintiff was the occupier of an arable field, across which a foot way, from time immemorial, had been used by every person at his pleasure; but the plaintiff and his predecessors had also, from time immemorial, ploughed up the foot way when, and in such parts, as they thought fit, and in

(a) *Reg. v. Deane*, 2 Allen, 233.

(b) *Reg. v. Buchanan*, 3 Kerr, 674. See as to dedication by the Crown, *Cole v. Maxwell*, 3 Allen, 183.



other parts lifted the plough across it. The defendants were surveyors of highways, and, in order to repair the foot way, placed materials on it, making it a hard causeway, so as to prevent the plaintiff from ploughing it up: —*Held* that the foot way was a highway, which, it must be assumed, had been dedicated to the public, subject to the condition that the owners of the soil might plough it up, and that there could at law be such a limited dedication, and that the right to plough up the footpath, and thereby temporarily interfere with the use of it by the public, was reasonable, and not inconsistent with the dedication. (a) So there may be a dedication of a way to the public, subject to a right of the owner of the land through which it passes to have a gate, at certain seasons, run across it. (b)

The owner, who dedicates to public use, as a highway, a portion of his land, parts with no other right than a right of passage to the public over the lands so dedicated, and may exercise all other rights of ownership not inconsistent therewith; and the appropriation made to and adopted by the public, of a part of the street, to one kind of passage, and another part to another, does not deprive him of any rights, as owner of the land, which are not inconsistent with the right of passage by the public. (c)

In order to constitute a valid dedication to the public of a highway, by the owner of the soil, it is clearly settled that there must be an *intention* to dedicate, an *animus dedicandi*, of which the user by the public is *evidence*, and no more; and a single act of interruption by the owner is of much more weight upon a question of intention than many acts of enjoyment. (d)

(a) *Arnold v. Blaker*, L. R. 6 Q. B. 433 (Ex. Chr.); *Mercer v. Woodgate*, L. R. 5 Q. B. 26; 39 L. J. (M. C.) 21, affirmed.

(b) *Bartlett v. Pratt*, 2 Thomson, 11.

(c) *St. Mary Newington v. Jacobs*, L. R. 7 Q. B. 53, per Mellor, J.

(d) *Mercer v. Woodgate*, L. R. 5 Q. B. 32, per Hannen, J.; *Hawkins v. Baker*, 1 Oldright, 423, per Des Barres, J.

To constitute a public highway by user, there must be an intention, expressed or implied, of dedication to the public on the part of the owner who permits such user. (a) Adoption by the public, and acquiescence, at least, if not user, are most material ingredients to constitute a binding dedication. (b)

The intention of the party to dedicate must be clear, and time is considered an essential ingredient. The act or assent of the public must be manifest and complete, and even then a subject cannot, by any spontaneous act of appropriation, impose a highway upon the public. If a highway, the public become bound to repair it, and, consequently, their adoption or assent becomes important. Such adoption and assent, in the case of allowances, are waived by the expenditure of public money in opening or repairing, the performance of statute labour, user, etc.; but, without some evidence of adoption by user, or other manifestation, an allowance for road at common law would continue an allowance only, and not a road in fact. (c) A reservation inconsistent with the legal character of a dedication would be void. (d)

It seems there may be a public highway without its being a thoroughfare; at all events, if a highway were stopped at one end so as to cease to be a thoroughfare, it would, in its altered state continue a highway. The old doctrine that a highway implied a thoroughfare, has been so far modified by more recent decisions that there may be in a square in a great city, lighted and paved at the public expense, which the public, in fact, frequent, passing along its three sides, or to the houses therein sit-

(a) *Leary v. Saunders*, 1 Oldright, 17.

(b) *Rex v. Inhab. St. Benedict*, 4 B. & A., 447, 12 Ea. 192; *Rex v. Allan*, 2 U. C. Q. B. O. S. 100, per *Robinson*, C. J.

(c) *Ib.* 103-4, per *Macaulay*, C. J.

(d) *Arnold v. Blaker*, L. R. 6 Q. B. 437, per *Kelly*, C. B.

uate, a highway in legal contemplation, although it is a *cul de sac*. (a)

But where such highway is claimed by dedication, the acts or declarations relied on to support it must be clear and unequivocal, with manifest intention to dedicate. There is a difference between a *cul de sac* in the city and one in the country; much stronger acts being required to establish a public highway by dedication in the latter than in the former. The mere acting so as to lead persons to suppose that a way is dedicated does not amount to a dedication, if there be an agreement which explains the transaction. (b) The question of dedication or no dedication is a question of fact for the jury. (c)

Whether a certain road constitutes a highway or not is generally a mixed question of law and fact, depending much upon circumstances and the peculiar features of each case. (d) The expenditure of public money on a road laid out thirty feet wide can only make it a public highway to that extent, and will not have the effect of extending it to a highway four rods wide. (e) Where a road has been used as a public highway, and the usual statute labour of the locality done upon it from year to year, this will, in the absence of explanation, establish the road as a public highway. (f) But where it appeared from the evidence that statute labour had been performed on part of the road in question, but only to a limited extent, and not from time to time, so as to shew it was a road "whereon the statute labour hath been usually performed":—*Held*, not sufficient to establish the road as

(a) *Hawkins v. Baker*, 1 Oldright, 419-24; *Rex v. Marquis*, Devonshire, 4 A. & E. 713, per *Patteson*, J.

(b) *Ib.* 419. See also *Poole v. Huskinson*, 11 M. & W. 827; *Bateman v. Bluck*, 18 Q. B. 870, 21 L. J. Q. B. 406.

(c) *Belford v. Haynes*, 7 U. C. Q. B. 464; *Reg. v. Gordon*, 6 U. C. C. P. 213; *Reg. v. G. W. R. Co.*, 12 U. C. Q. B. 251, per *Robinson*, C. J.

(d) *Rex v. Allan*, 2 U. C. Q. B. O. S. 102, per *Macaulay*, J.

(e) *Basterach v. Atkinson*, 2 Allen. 439.

(f) *Reg. v. Hall*, 17 U. C. C. P. 286, per *J. Wilson*, J.

a public highway under the 22 Vic. c. 54: (a) Where about fifteen years before the finding of the indictment the Township Council had built a bridge on the road, and expended money thereon, and statute labor had been done thereon :—*Held*, under the authority of s. 313, Con. Stats. U. C., c. 54, it must be deemed a public highway. (b)

A party is punishable for non-performance of statute labour, and under Con. Stat. U. C. c. 55, s. 86, a warrant might have issued to imprison a person for non-performance of statute labour without first summoning him to answer or making a conviction. (c) To save himself from fine a party must when called upon, perform his statute labour *within the division* of the township in which he resides. (d)

It seems a person who has land in a township, but is not himself resident there, is not liable to be convicted for non-performance of statute labor in the township where the land lies. (e) Where the President and Board of Police at Cobourg, under the Cobourg Police Act issued a warrant for non-performance of statute labour, to imprison for the remainder of the penalty for twelve days absolutely, and not unless the fine and costs should be sooner paid, and after alleging summons, appearance, conviction, and warrant of distress, averred that part of the sum directed to be levied had been made, and that the Plaintiff had no more goods :—*Held*, that the warrant to imprison was clearly bad, because it was after part of the fine had been paid, and was for an *absolute time* and not unless fine and costs be sooner paid. (f)

(a) *Reg. v. Hall*, 17 U. C. C. P. 282, per *J. Wilson, J.*

(b) *Prouse v. Corporation Mariposa*, 13 U. C. C. P. 560.

(c) *Reg. v. Morris*, 21 U. C. Q. B. 392.

(d) *Gates v. Devenish*, 6 U. C. Q. B. 260.

(e) *Moore v. Jarron*, 9 U. C. Q. B. 233. See (Ont.) 32 Vic. c. 36, s. 79-82.

(f) *Trigerson v. Board of Police Cobourg*, 6 U. C. Q. B. O. S. 405.

Nuisances to highways are of two classes : positive, as by obstruction, and negative, by want of sufficient reparation.

A railway company by their charter were bound to restore any highway intersected by their track "to its former state, or in a sufficient manner not to impair its usefulness." They constructed their road across a street in the city of Hamilton, which was sixty-six feet wide, and connected the street again by a bridge across the track forty feet two inches in width. Being indicted for a nuisance in thus making the street narrower than before, and the jury having found the facts above mentioned:—*Held*, that they might with propriety find this to be a sufficient compliance with the Act, and that the Defendants were not *necessarily* guilty of a nuisance because the bridge was not of equal width with the street crossed. (a)

But where a railway company in passing over a highway, had lowered the highway at the point of intersection, so as to make it inconvenient and dangerous, this was held to be an indictable nuisance. (b)

Where a street ran into a road allowance, but did not cross it, and the Defendants being incorporated under 16 Vic. c. 190 for gravelling the road, so far lowered the level in order to get the grade prescribed by the statute, as to make the approach from this street impassable:—*Held*, that they were justified in so doing, and not guilty of a nuisance in obstructing the street, or obliged to restore the approach. (c)

A fire lighted by a wheelwright for the purposes of his business, within fifty feet of the centre of the highway, such fire being fed by lifting a lid in the wall on the

(a) *Reg. v. G. W. R. Co.*, 12 U. C. Q. B. 250.

(b) *Reg. v. G. T. R. Co.*, 17 U. C. Q. B. 165.

(c) *Reg. v. W. & D. P. & G. R. Co.*, 18 U. C. Q. B. 49.

outside of the premises, is not a public nuisance within the 5 & 6 Wm. 4, c. 50, s. 72; for to constitute the act an offence within this section it must be shown that some injury is done to the highway, or some danger or annoyance is occasioned to passengers in using it. (a)

When there has been a dedication of a highway to the public, anything afterwards done by the owner interfering with that right of way is a nuisance. (b)

The use of a velocipede on the sidewalk, though no one be near it, may be an obstruction within the provisions of a by-law that no person shall, by any vehicle, encumber or obstruct the sidewalk. (c)

In *Reg. v. Fralick*, (d) it was held under the facts stated in that case, the defendant, being the lessee of the ordinance department, had no right to obstruct the road leading to the Niagara Falls Ferry, and that he was guilty of an indictable nuisance in so doing. But where an allowance for a road has never been opened as a public highway, the notice and order required by the 9 Vic. c. 8 not being given; an indictment for a nuisance in obstructing it cannot be maintained. (e) In *Reg. v. G. W. R. Co.* (f) the defendants were indicted for a nuisance in obstructing the streets, but it was held that under the facts stated they were entitled to an acquittal.

Where a waggon is left standing in the highway, the owner cannot exempt himself from liability by shewing that the person injured thereby was drunk at the time of the accident; for it cannot be permitted to a person to place any obstruction that he pleases in the highway, and to consider himself responsible for no injury that may

(a) *Stinson v. Browning*, L. R. 1 C. P. 321; and see *Hadley v. Taylor*, *ib.* 53.

(b) *Mercer v. Woodgate*, L. R. 5 Q. B. 31, per *Blackburn, J.*

(c) *Reg. v. Plummer*, 30 U. C. Q. B. 41.

(d) 11 U. C. Q. B. 340.

(e) *Reg. v. Purdy*, 10 U. C. Q. B. 545.

(f) 21 U. C. Q. B. 555.

happen from it, except to persons who are sober and vigilant in looking out for nuisances that they had no reason to expect to find there. (a)

If a road is laid out over land upon which a fence is standing, it is the duty of the Commissioners of Highways to remove the fence, and the owner of the land omitting to do so, is not punishable under the Act 5, Wm. 4, c. 2, s. 16, as for obstructing or encroaching upon a highway. (b)

A conviction for obstructing a highway is bad unless it appears on the face of it that the place was a public highway. (c)

Where a person has sold lots according to a plan in which a lane is laid out in the rear, he cannot afterwards shut up such lane, and the fact that he had previously conveyed portions of the land comprised in the lane would only affect so much as he had thus precluded himself from giving up to the public, and would not entitle him to close up the whole. (d)

C. owned township lot 32, and H. lot 31, adjoining it on the east. In 1856 H. laid out part of 31 with village lots, according to a registered plan, which shewed streets called First, Second, Third and Fourth Streets, etc., running from east to west across the block to the east limit of Lot 32. In 1858 C. laid out the east part of Lot 32 by a plan also registered, by which a street called Augusta Street ran north and south, along the east side of 32, and from it streets ran westerly numbered 1, 2, 3, 4, etc., corresponding to and a continuation of First, Second, Third and Fourth Streets on H's block, Augusta Street only intervening. Village lots had been sold on street 4 in

(a) *Ridley v. Lamb*, 10 U. C. Q. B. 354.

(b) *Ex parte Morrison*, 1 Allen, 203; and see *Cole v. Maxwell*, 3 Allen, 183.

(c) *Reg. v. Brittain*, 2 Kerr. 614.

(d) *Reg. v. Boulton*, 15 U. C. Q. B. 272.

C's block, but none in Fourth Street on H's land, and the closing of this last named street would not shut out a purchaser of any lot from access to the nearest highway :—*Held*, that under 24 Vic. c. 49 the owner of H's block might, by a new survey and plan, close up Fourth Street on his land, for the laying out a street in continuation of it by C. did not make all one street, so as to render the provision in that statute applicable, and the owner of H's block having been convicted at the Quarter Sessions of a nuisance for so doing, on application to this Court :—*Held*, that he was entitled to an acquittal. (a)

The placing of a gate across a travelled road after the public have been enjoying it for upwards of twenty years can never have the effect of abolishing a highway. It seems that a gate being kept across a public road is not conclusive to show that the road is not a public one, as the road may have originally been granted to the public, reserving the right of keeping a gate across it to prevent cattle straying. (b)

Where a road was laid out over land by the owners thereof, and was so used by the public without interruption for thirty or forty years :—*Held*, that it had become a public highway, and could not be stopped up by by-law of the Municipal Council, particularly at the instance of a purchaser of one of such owners of the land, with knowledge too on his part of the existence of the road. (c)

Where a road had, for more than fifty years, been used as a road between the Townships of York and Vaughan, the original road allowance between the townships being to the north of it, and this road being, in fact, wholly within the Township of York and part of lot 25. The owner of the lot had been indicted for closing up this

(a) *Reg. v. Rubidge*, 25 U. C. Q. B. 299.

(b) *Johanson v. Boyle*, 8 U. C. Q. B. 142.

(c) *Moore v. Corporation Esqueving*, 21 U. C. C. P. 277.



road, and convicted in 1870; and the Corporation of York then passed a by-law to close it, reciting that there was no further necessity for it, by reason of the road allowance :—*Held*, there being in the facts above stated sufficient evidence of dedication and acceptance of this road as a highway, that it was a road dividing different townships, over which the County Council only had jurisdiction, and that the by-law therefore was illegal. Such a road need not consist of an original allowance, but may be acquired or added to by purchase or dedication. (a)

To justify shutting up a highway under 1. *Rev. Stat.* c. 66 the return of the Commissioners must shew, either expressly, or by necessary implication, that the road is not required for the convenience of the inhabitants of the parish. (b)

The Commissioner of Crown Lands has no authority to open roads on lands granted by the Crown, and any money expended for such purpose under authority so given, is not public money, within 22 *Vic.*, c. 54, s. 33; and the roads so opened do not, therefore, become public highways under that Act. (c)

A Municipal Corporation had power to open new roads through any person's lands, under the restrictions in the Statute 12 *Vic.*, c. 81, s. 31. (d) But a by-law of a Municipal Council for the alteration of an old road, has been held bad, in not assigning any *width* to the new road. (e)

At common law, an ancient highway might be changed by writ of *ad quod damnum*. But this writ only avails so far as the rights of the Crown extend, and

(a) *Re M'Bride*, 31 U. C. Q. B. 355.

(b) *Oulton v. Carter* 4 Allen, 169. As to by-law to close and sell road, see *Baker and Corporation Saltfleet*, 31 U. C. Q. B. 386.

(c) *Reg. v. Hall*, 17 U. C. C. P. 282.

(d) *Dennis v. Hughes*, 8 U. C. Q. B. 444.

(e) *Re Smith and Council Euphemia*, 8 U. C. Q. B. 222.

only in relation to rights which the Crown may grant. (a)

The 29 & 30 Vic., c. 51, s. 316, vests the soil and freehold of all road allowances in the Crown. Such was the law under the former Municipal Act. (b)

To allow a public highway to become ruinous and out of repair, is a nuisance indictable at common law. The party on whom the obligation to repair is imposed, whether by common law or otherwise, is indictable for breach of that obligation, *ad commune damnum*. (c) Though a Statute provides that the proprietors of a road shall not collect any tolls thereon while out of repair, this does not suspend the common law right of indictment in case of non repair. (d) Where a common and public highway is impassable and out of repair, although not from accident, casualty, or emergency, a person using and passing along the highway may go through the adjoining land, going no further from the highway than is necessary, and returning thereto as soon as practicable, and doing no unnecessary damage in that behalf. (e) It would seem to make no difference whether the adjoining land be sown with grain or not. (f)

Road Companies owning public highways, and entitled to tolls for the use thereof, are, upon the principles of the common law, liable to an individual lawfully using the road, and guilty of no fault on his part, for a special injury received in consequence of the company permitting the road to be out of repair; and such want of repair is also a public nuisance, as respects the public at large, and the company may be liable to an indictment therefor. (g)

(a) *Reg. v. Meyers*, 3 U. C. C. P. 321, per Macaulay, C. J.

(b) See *Corporation Burleigh v. Hales*, 27 U. C. Q. B. 72; *Corporation Sarnia v. G. W. R. Co.*, 21 U. C. Q. B. 64.

(c) *Reg. v. Corporation Paris*, 12 U. C. C. P. 450, per Draper, C. J.

(d) *Ib.* 445.

(e) *Carrick v. Johnston*, 26 U. C. Q. B. 65.

(f) *Ib.* 68, per Hagarty, J.

(g) *MacDonald v. Hamilton and P. D. P. L. Co.* 3 U. C. C. P. 402.

Grantees of the Crown of public highways are indictable at the suit of the public for default in repairing such highways, although they are also liable to the Crown for the breach of their covenant to that effect, contained in the patent; and this liability follows and accompanies the transfer of the property, so as to make the purchaser of part, or mortgagee of the residue, also indictable for the same cause, although it has been expressly agreed between grantor and grantee, that the former shall and the latter shall not be bound to repair. To maintain an indictment against the defendant under such circumstances it is not necessary that the Government Engineer should have first condemned the road by a certificate. (a)

A company having been formed under the provisions of the joint-stock road Act in several townships, including the defendants, subsequently mortgaged said road to the counties of Lincoln and Welland, which counties, at a later date, took an absolute conveyance, and passed a by-law, by which they assumed it as a county road. They afterwards passed a by-law, requiring the respective Townships (the defendants' being one of them) through which the road passed to keep the same in repair. On the trial, the defendants were found guilty. On special case left to this Court:—*Held* that the road never vested in or became a county road within the meaning of the Statute, but as one acquired by the county, as assignees of the road company, and, as such assignees, they hold the same, with all the rights and subject to all the duties and obligations which the law imposed upon the said company, which constructed it, and the county has no power to divest itself of this obligation, and throw the duty of repairing on the defendants. (b)

(a) *Reg. v. Mills*, 17 U. C. C. P. 654.

(b) *Reg. v. The Corporation of Louth*, 13 U. C. C. P. 615.

Where a road ran through the town of Whitby, and was part of a macadamized road, made by the Government, before the 13 & 14 Vic., c. 14, and afterwards transferred to the plaintiffs:—*Held* that, under this Statute, the Corporation of the town were clearly bound to keep in repair that portion of it within their limits. (a)

Municipal Corporations are, under the 29 & 30 Vic., c. 51, s. 339, bound to keep all highways in the township in repair, and they have all necessary powers given to them for enabling them to perform that duty. (b) The Con. Stats. U. C., c. 49, s. 84, provides that, after any road has been completed, and tolls established thereon, the company shall keep it in repair. (c)

The Des Jardins Canal Co. having been indicted for not keeping in repair the bridge over their canal, where it crosses the highway, built for them by the Great Western Railway Company:—*Held*, that they, and not the Railway Company, were bound to keep such bridge in repair:—*Held*, also, that evidence of the state of the bridge, a few days before the trial, was admissible, not as proof of that fact, but as confirming the other witnesses, who swore to its state at the time laid in the indictment, and as shewing such state by inference. (d)

The members of a gas company, having Parliamentary powers to open streets, for the purpose of public lighting, but having no similar powers for the purpose of conveying gas to private houses, are liable to be convicted for a nuisance, in obstructing the highway, if they open the streets in order to lay down service pipes from the mains,

(a) *Port Whitby R. Co. v. Corporation Town Whitby*, 18 U. C. Q. B. 40.

(b) *Culbeck v. Corporation of Brantford*, 21 U. C. Q. B. 276.

(c) *Cannell v. The St. M. & P. L. J. R. Co.* 28, U. C. Q. B. 250, per A. Wilson, J.

(d) *Reg. v. Des Jardins Canal Co.*, 27 U. C. Q. B. 374. See as to repair of hundred bridges within the English Highway Act, 1835, *Reg. v. Inhab. Claret and Longbridge*, L. R. 1 C. C. R. 237; as to repair of public buildings, *Hawkeshaw v. Dis. Council Dalhousie*, 7 U. C. Q. B. 590; as to repair of roads in parishes, *Reg. v. Folville*, L. R. 1 Q. B. 213, 35 L. J. (M. C.) 154.

already laid down by them, for public lighting, to the houses of the adjacent inhabitants. An inhabitant who directs such service pipes to be laid down to his house is also similarly liable. (a)

When a street, which was a public highway, had been once put in good repair, but at the time of the passing of the special Act was out of repair:—*Held* that the Commissioners had no power, under s. 53, 10 & 11 Vic., c. 34, to do the necessary repairs, and charge the expenses on the adjoining occupiers, as the word “theretofore” in that section is not restricted to the time of the passing of the special Act, but is used in its ordinary sense. (b)

Where a highway, fifty feet in width, was set out under the General Inclosure Act, 41 Geo. 3, c. 109, but only twenty-five feet was used as actual road, the sides being allowed to grow up with trees:—*Held*, that the right of the public was to have the whole width of the road, and not merely that part which had been used as the *via trita*, preserved free from obstructions, and that such right had not become extinguished by the fact that the trees had been allowed to grow up within the fifty feet for the period of twenty-five years. (c)

Where a railway company carried the highway across and over their road by a bridge:—*Held*, that, under Con. Stats. U. C., c. 66, s. 9, s. s. 5, s. 12, s. s. 4, the company were bound to keep in repair such bridge, and the fence on each side of it. (d)

The Corporation of the county of Wellington, under 29 & 30 Vic., c. 51, s. 339, had exclusive jurisdiction over a bridge belonging to them “on the line of road and public highway between two townships in the same

(a) *Reg. v. Knight*, 7 U. C. L. J. 23.

(b) *Reg. v. Great Western R. Co.*, 5 U. C. L. J. 216.

(c) *Turner v. Ringwood H. Board*. L. R. 9, Eq. 418.

(d) *Vanallen v. G. T. R. Co.*, 29 U. C. Q. B. 436.

county," and having jurisdiction, the common law, irrespective of the Statute, would impose upon them the duty of repairing it. (a)

The word "between," in the 29 & 30 Vic., c. 51, s. 329, must be construed in its popular sense; and where a bridge is constructed over navigable waters, and connects two opposite shores, lying in different counties, such bridge is between such two counties, and they are jointly answerable for its maintenance, even though the counties, as respectively containing the townships between the shores of which the current flows, reach to the middle of the water, and are divided only by the invisible untraceable line called *medium filum aquæ*. (b)

On an indictment for nuisance in obstructing a highway, the Crown put in the application by way of petition, under C. S. U. C., c. 93, s. 6, to the County Council of the county of Kent, in these words:—"We, the undersigned, freeholders of the fourth ward, of, etc., humbly shew: That your humble petitioners are labouring under a most weighty grievance, in consequence of a dispute having arisen out of the different surveys of the, etc., and as it would appear that no final adjustment can be brought about other than is provided by the 31st clause of the 12 Vic., c. 35, your petitioners humbly pray that the County Council of, etc., will give this our prayer a due consideration, and by acting upon the above-named clause of the 12 Vic., c. 35, you will further and preserve the best interests of your petitioners: As the matter now stands, it is impracticable for us to expend our public money, or perform our statute labour, having no guarantee that the same will prove to be properly applied." There was also produced a memorial of the County

(a) *Corporation Wellington v. Wilson*, 14 U. C. C. P. 299.

(b) *Harrold v. Corporation Simcoe*, 18 U. C. C. P. 1 (in E. & A.) S. C. 16 U. C. C. P. 43, affirmed.

Council of Kent, to the Governor-General, under the same Act, stating that over two-thirds of the freeholders of, etc., had petitioned the Council for a survey to be made of the line in dispute, in order to clear up a doubt that existed as to the site of the concession in question, owing to the dispute that had arisen out of the different surveys, and referring his Excellency to a copy of the petition, by which it would be seen that the petitioners bound themselves to be governed by the conditions of 12 Vic., c. 35, s. 31, (a) and praying that the said line might be surveyed. It was proved, and not disputed, that the necessary number of resident landholders under the Act had applied for the survey, but it was objected that the *petition* did not shew this:—*Held*, following *Cooper v. Wellbanks*, (b) that everything was to be presumed to be done correctly until the contrary was proved, and here it had been proved that the necessary number of persons under the Act had applied for the survey:—*Held*, also, as to the other objections, viz., that the petition did not shew any want or obliteration of the original survey, and that neither petition nor memorial prayed for placing monuments, that the two documents could not be read in any other sense than as containing an application to the Governor, requesting the making of the survey under the Act, and if to be made under the Act, then that the marking by permanent stone boundaries, under the direction of the Commissioner of Crown Lands, in the manner prescribed by the Act, was an incident to the survey necessarily involved in the application for the survey, and therefore *held* that the petition was sufficient. (c)

As to public highways in the navigable rivers of this

(a) U. S. U. C. c. 93, s. 6.

(b) 14 U. C. C. P. 364.

(c) *Reg. v. M'Gregor*, 19 U. C. C. P. 69.

country, the civil law prevailed in the whole Province of Quebec until the division thereof in 1792. The 32 Geo. 3, c. 1, which introduced into the Province of Ontario the law of England as to property and civil rights, included the law as to highways on roads and in streams. After the passing of that Act, the civil law continued applicable to Quebec. Although, in this Province, we have adopted the law of England as to public highways, yet, as in other cases of our adoption of English laws, it only prevails here so far as applicable to the state and condition of this country. It is obvious that usage from time immemorial, which, in England, is a material ingredient in determining whether a river is a highway or not, could not be applied to any of the inland waters in Ontario, unless presumed in relation to the wandering tribes who may have roamed through this part of North America, before its discovery by European navigators. (a)

The 32 Geo 3, c. 1, s. 3, superseded the former law of Canada (or the civil law still prevailing in the Province of Quebec), and in introducing the common law of England must be taken *proprio vigore* to have rendered all navigable waters, existing at the time of its introduction, *publici juris*, and more especially if previously entitled to have been so regarded under the abrogated law. (b)

This being a newly-discovered country, first occupied within the period of legal memory, and much of it even within living memory, in the application of the common law to it, positive usage immemorially, or from which prior usage immemorially might be inferred, cannot be necessary to render a naturally navigable water course *publici juris*. When our inland streams are proved to be,

(a) *Reg. v. Meyers*, 3 U. C. C. P. 313 et. seq., per Macaulay, C. J.

(b) *Ib.* 346, per Macaulay, C. J.



in fact and in their natural state, navigable, they are *prima facie* public highways by water. In this light, user or non-user is only material, as auxiliary evidence, contributory to the inquiry whether a stream was or was not navigable from the beginning ; but it does not therefore follow that it is the only medium, or an indispensable circumstance in the proof. (a)

In the application of the common law to Ontario, the fact of the natural *capacity* of the stream, and not the fact of usage, is most material to be considered. It must, of course, be determined by a court and jury, in each case as it arises, whether a water course ever was, or continued to be, a public highway, or a navigable stream, in the full and comprehensive meaning of the term, and, therefore, a public easement. The question of law for the Court being what constitutes a public or navigable river, and whether there was sufficient evidence thereof, or to repel it, the question of fact for the jury being, whether, according to the *data* laid down by the Court, and the evidence, it was, in fact, so navigable. (b)

As to the Province of Ontario, when our territory was devoted to settlement, the use of all streams practicable for navigation may be justly considered as dedicated to the public use, upon the principles of—first, the civil, and afterwards the common law ; so that, although not pre-occupied by public use, they are to be looked upon as open to the public. (c)

In this country, streams which are not navigable continuously, but interrupted by occasional rapids, rocks, shoals, or other natural obstructions, causing what are called “portages,” are, nevertheless, throughout those portions not thus impeded, undoubtedly highways. (d)

(a) *Reg. v. Meyers*, 3 U. C. C. P. 347, per *Macaulay*, C. J.

(b) *Ib.* 348, per *Macaulay*, C. J.

(c) *Ib.* 351, per *Macaulay*, C. J.

(d) *Ib.* 352, per *Macaulay*, C. J.

Where a portion of water, forming part of Lake Ontario, at extraordinary periods when the water of the lake was pressed up at this particular part of it by strong winds, admitted, of scows passing over it, but the water was not more than four or five feet deep, and at ordinary times it was quite shallow and fordable:—*Held* that this was not navigable water, *Held*, also, that the Crown had a right to survey and lay out a highway through this portion of water. (a)

It is impossible to hold that to be a natural stream or water course, which could be obstructed by the act of ploughing and harrowing land, in the ordinary course of husbandry, and a ditch in a person's land which may be so obstructed, is not a natural stream or highway. (b)

Where the capacity of a creek in its natural state, without improvement, during spring freshets would not permit logs, timber, etc., to float and pass down:—*Held* that it was not a navigable river. (c)

Navigable rivers are public highways. (d) It would seem that the rule of the common law of England, as to the flux and reflux of the tide being necessary to constitute a body of water navigable, does not apply to our waters; and it seems that our large lakes, and navigable rivers, and inland waters are to be viewed as navigable rivers at the common law. (e)

All rivers above the flow of the tide, which may be used for the transportation of property, as for floating rafts and driving timber and logs, and not merely such as will bear boats for the accommodation of travellers, are highways by water, and subject to the public use.

(a) *Ross v. Corporation Portsmouth*, 17 U. C. C. P. 195.

(b) *Murray v. Dawson*, 19 U. C. C. P. 317, per Gwynne, J.

(c) *Whelan v. M'Lachlan*, 16 U. C. C. P. 102.

(d) *Gage v. Bates*, 7 U. C. C. P. 121, per Richards, C. J.; *Olivia v. Bissonault*, S. L. C. A. 524.

(e) *Gage v. Bates*, 7 U. C. C. P. 121, *et seq.*, per Richards, C. J.

In determining whether a river is public or private, its mere capacity during the spring freshets, or after heavy rains, to float down single sticks of timber or logs is of itself a very uncertain criterion of the public or private nature of the river, for there is no stream so small but which may at times suffice and be used for driving down a log or piece of timber, and, therefore, its breadth and its length and depth at ordinary times, and its capacity for floating rafts, etc., are proper to be considered. (a)

In *Esson v. McMaster* (b) it was held that a river which extended about twenty-eight miles into the country, and had been long used for navigation of boats and canoes, and for floating down logs and timber, was a common highway above where the tide flowed. All rivers above the flowing of the tide, and whether the property of the river be in the Crown, or in a subject, which afford a common passage, not only for large vessels but for boats or barges, are, by the principles of the common law, public highways. (c)

The defendants under their act of incorporation, 19, Vic. c. 21, and as assignees of the Canada Company, claimed a right to erect any works for improving the navigation of the navigable river Maitland, and to be owners of the bed of the stream; — *Held*, that the powers given for that purpose were distinct from those granted for the purposes of their railway, and that, admitting the ownership, it was still subject to the public right, and that any obstruction to the highway or easement of the river for the purposes of navigation, was indictable as a nuisance. (d)

An indictment will not lie for merely erecting piers in a navigable river; it must be laid *ad commune nocendum*,

(a) *Rowe v. Titus*, 1 Allen, 326.

(b) 1 Kerr, 501.

(c) *Ib.* 506, per *Chipman*, C. J. See also *Perley v. Dibblee*, 1 Kerr, 514.

(d) *Reg. v. B. & L. H. Ry. Co.*, 23 U. C. Q. B. 208.

and whether it was so or not must be decided by the jury. (a)

Where, on an indictment for a nuisance in obstructing the North Sydenham River and Queen's highway, by erecting a dam near lot 16, 13th Concession of Sombra, the evidence showed the river in question to be affected by the waters of the St. Clair—to be navigable much higher up than the defendant's dam at some seasons, and at all seasons for some miles above it; that vessels and boats of a certain size had, before the erection of the dam, passed without obstruction to a point higher up the river than the part where the dam was erected, though it did not appear to have been used to any great extent higher up the river than what was called the Head of Navigation, a point below the dam :—*Held*, that upon such evidence the jury were warranted in finding the stream to be a public navigable water course. (b)

It would seem that the English rule that the land covered by the waters of rivers, above the flux of the tide, belongs to the riparian proprietors does not prevail here. In our waters the grant extends to the water's edge, and the land covered with water and ungranted is the property of the Crown, (c) subject to the right of the public to pass over the water in boats, and to fish and bathe therein. (d)

In an action for obstructing a river by erecting a mill-dam, it is not a proper question for the jury whether the benefit derived by the public from the mill is sufficient to outweigh the inconvenience occasioned by the dam. (e) The provisions of *Magna Charta* and other early statutes

(a) *Ross v. Corporation Portsmouth*, 17 U. C. C. P. 204, per A. Wilson, J.

(b) *Reg. v. Meyers*, 3 U. C. C. P. 305.

(c) *Parker v. Elliott*, 1 U. C. C. P. 489, per Sullivan, J.

(d) *Atty. Genl. v. Perry*, 15 U. C. C. P. 329. See, however, *Fournier and Olivia*, S. L. C. A. 427.

(e) *Rowe v. Titus*, 1 Allen, 326.

which prohibited weirs apply only to navigable rivers. (a)  
Weirs in such rivers are illegal, unless they existed before the time of Edward I. (b)

The 5 & 6 Wm. 4, c. 50, s. 72, which imposes a penalty on any person riding or driving by the side of any road, only applies to footpaths by the side of roads, and not to footpaths in general. (c)

Under 27 & 28 Vic., c. 101, s. 25, the owner is liable to a penalty if cattle, sheep, etc., are found straying along any highway, notwithstanding they are under the control of a keeper at the time. (d)

Three magistrates forming a part of the Court of Sessions, by whom the return of a precept issued under c. 62 of the Revised Statutes, for laying out a road is to be decided, are not the three disinterested freeholders contemplated by that Act. (e)

The laying out of a public highway by Commissioners of Highways under the Act, 5, Wm. 4. c. 2, does not become invalid by reason of the neglect of the Commissioners to deliver a return of such laying out within three months to the Clerk of the Peace, as directed by the 15th section, this being only a directory provision. (f)

On an indictment for nuisance to a highway, if the facts shew it to be a proceeding substantially for the trial of a civil right, the defendants may consent that the prosecutor select three or four of them, and proceed only against the latter, the other defendants entering into a rule to plead guilty if those on trial are convicted. This course may be adopted to prevent the charges of putting them all to plead. (g)

(a) *Leconfield v. Lonsdale*, L. R. 5 C. P. 657.

(b) *Rolle and Whyte*, L. R. 3 Q. B. 286.

(c) *Reg. v. Pratt*, L. R. 3 Q. B. 64.

(d) *Lawrence and King*, L. R. 3 Q. B. 345.

(e) *Reg. v. Chipman*, 1 Thomson, 292.

(f) *Brown v. M'Keel*, 1 Kerr, 311.

(g) *Whelan v. Reg.* 28 U. C. Q. B. 53, per A. Wilson, J.

Although a proceeding by indictment for a nuisance is criminal in form, the same evidence that would support a civil action for an injury arising from the nuisance will support the indictment. (a)

In *Reg v. Rose* (b) it was held that the minutes of the boundary line Commissioners produced in the case could not be considered a judgment, within the meaning of 3 Vic. c. 11, and that the defendant should therefore have been permitted to give evidence contradicting such minutes. The second section of this act which provides that every such judgment shall be filed is directory only, and the omission to file will not affect the validity of the judgment

If the indictment allege a nuisance to be near a certain lot, and the evidence shows it to be *on* it, this will be a fatal variance. (c) Such variance could probably now be amended under the 32 & 33 Vic., c. 29, s. 71.

It was doubtful whether after an indictment for nuisance to a highway had been removed by *certiorari*, and tried at the Assizes upon a *nisi prius* record, and the defendants found guilty on a motion afterwards made in term for judgment, upon the conviction the Court could under the 19 Vic., c. 43, s. 316, give judgment out of term. (d)

After a verdict of acquittal on an indictment for nuisance in obstructing a highway tried at a court of *Oyer and Terminer*, the Court will refuse a *certiorari* to remove the indictment, with a view of applying for a new trial, or to stay the entry of judgment so that a new indictment may be prepared and tried without prejudice, and this though the motion is made on the part of the Crown with

(a) *Reg. v. Stephens*, 2 U. C. L. J. N. S. 223, 14 W. R. 859.

(b) 1 U. C. L. J. 145.

(c) *Reg. v. Meyers*, 3 U. C. C. P. 305.

(d) *Reg. v. G. T. R. Co.*, 17 U. C. Q. B. 165, per *Robinson*, C. J. See 29 & 30 Vic., c. 40, s. 4, *et seq.*

the assent of the Attorney-General. (a) But the Court will arrest the judgment on an indictment for nuisance, so that a new indictment may be preferred. (b)

After verdict of acquittal on an indictment for nuisance tried at the Assizes, a motion was made with the concurrence of the Attorney-General, for a *certiorari* to remove the indictment, with a view to obtain a new trial, but no ground was shewn by affidavit, and the new trial was moved for on the same day, being the fourth day of term :—*Held*, that there was nothing to warrant the ordering of a *certiorari*, and that the motion for a new trial could not be entertained until the Court were in possession of the record. (c) When the case is tried at the Assizes the motion for a new trial need not be made within the first four days of the ensuing term, for the rule of practice requiring a party to move for a new trial within the first four days of term only applies when the trial has been on a record emanating from this Court. (d)

*Obstructing the Execution of Public Justice.*—An indictment for refusing to aid a constable in the execution of his duty, and to prevent an assault made upon him by persons in his custody, with intent to resist their lawful apprehension, need not shew that the apprehension was lawful, nor aver that the refusal was on the same day and year as the assault, or that the assault which the defendant refused to prevent was the same as that which the prisoner made upon the constable ; neither is it any objection that the assault is alleged to have been made with intent to resist their lawful apprehension by persons already in custody. (e)

A magistrate's warrant of commitment upon a convic-

(a) *Reg. v. Whittier*, 12 U. C. Q. B. 214.

(b) *Reg. v. Rose*, 1 U. C. L. J. 145 ; *Reg. v. Spence*, 11 U. C. Q. B. 31.

(c) *Reg. v. Gzowski*, 14 U. C. Q. B. 591.

(d) *Ib.* 592, per *Robinson*, C. J.

(e) *Reg. v. Sherlock*, L. R. 1 C. C. R. 20 ; 35 L. J. (M. C.) 92.

tion for a penalty following the form given in 11 & 12 Vic., c. 43, Schedule (10,) and addressed "To the constable of D." can only be executed by the parish constable, and not by a county police constable, stationed at D. A conviction for wounding the county police constable in the execution of such a warrant, with intent to resist the prisoner's lawful apprehension thereunder, was therefore quashed. (a) But if the warrant had been specially directed to the police constable, or generally to all other constables and police officers of the division, the arrest would have been lawful. b)

In an indictment for obstructing an officer of Excise, under 27 & 28 Vic., c. 3, the omission in the indictment of the averment that, at the time of the obstruction, the officer was acting in the discharge of his duty, "under the authority of 27 & 28 Vic., c. 3," is not a defect of substance, but a formal defect, which is cured by verdict. (c) Where the indictment is under ss. 111 and 112, for obstruction by threats of force and violence, it is not necessary to set out the threats in the indictment, for the gist of the offence is not the meaning of the words, but the effect produced by them—namely, the obstruction. (d)

A person resisting a constable in executing an execution issued by a Justice of the Peace in the form K. in the schedule to the (N. B.) Rev. Stat., c. 137, is liable to an indictment. (e)

The fact that the defendant did not know that the person assaulted was a peace officer, or that he was acting in the execution of his duty, furnishes no defence. (f) It is sufficient that the constable was actually in the execution of his duty at the time of the assault. (g)

(a) *Reg. v. Sanders*, L. R. 1 C. C. R. 75, 36 L. J. (M. C.) 87.

(b) *Id.* 76, per *Kelly*, C. B.

(c) *Spelman v. Reg.* 13 J. C. J. 154.

(d) *Id.* 154, per *Drummond*, J.

(e) *Reg. v. M'Donald*, 4 Allen, 440.

(f) *Reg. v. Forbes*, 10 Cox, 362.

(g) *Id.*



Refusing to aid and assist a constable in the execution of his duty, in order to preserve the peace, is an indictable misdemeanor at common law. In order to support such indictment, it must be proved that the constable saw a breach of the peace committed, that there was a reasonable necessity for calling on the defendant for his assistance, and that, when duly called on to do so, the defendant, without any physical impossibility, or lawful excuse, refused to do so. It is no defence that the single aid of the defendant could have been of no avail. (a)

Before a party can be guilty of the offence of obstructing an officer in the execution of his duty, the latter must be acting under a proper authority. (b)

But if the process is regular, and executed by a proper officer, an obstruction, even by a peace officer, will be illegal, on the established principle that if one having a sufficient authority issue a lawful command, it is not in the power of any other, having an equal authority in the same respect, to issue a contrary command, as that would legalize confusion and disorder. (c)

Where an order was made by the Court of Quarter Sessions for payment of a sum of £169 16s. 6d. to F. S., for professional services rendered as an attorney-at-law, and the Clerk of the Peace, contrary to his duty in the matter, refused to record the order, and also to draw up, sign, and deliver to the County Treasurer, an order for payment of such sum to Mr. S, *per Cockburn*, C. J., this amounted to a misdemeanor in office, and justified the removal of the Clerk of the Peace therefrom. But if the latter thought the Court of Quarter Sessions were doing something illegal and unjustifiable, and if he entertained a belief that, when their attention was called to it, the

(a) *Reg. v. Brown*, C. & Mar., 314 ; Arch. Cr. Pldg. 684-5.

(b) Russ. Cr. 570 ; *Rex v. Osmer*, 5 Ea. 304.

(c) Russ. Cr. 571.

Court would rectify the error, it would be his duty to point out to the Court the mistake into which he supposed they had fallen, and a mere delay or strong remonstrance would not amount to a misdemeanor. But if, from the outset, he determines that, whether the Court agree with him or not, he will not comply with their order, or when he perseveres in disobedience to it, after he has brought the matter before them, he is guilty of a misdemeanor. (a)

Disobeying an order made by Justices of the Peace, at their Sessions, in due exercise of the powers of their jurisdiction, is an indictable offence. (b) And, on the same principle, if an Act of Parliament give power to the Queen in Council to make a certain order, and annexes no specific punishment to the disobeying it, such disobedience is nevertheless an indictable offence, punishable as a misdemeanor at common law. (c) So disobedience to an order of one or more Justices is an offence punishable by indictment at common law. (d) Every person mentioned in the order, and required to act under it, should, upon its being duly served upon him, lend his aid to carry it into effect. (e)

*Escapes.*—An escape is where one who is arrested gains his liberty, by his own act, or through the permission or negligence of others, before he is delivered by the course of the law. (f) If the escape is effected by the party himself, with force, it is usually called prison breach; if effected by others, with force, it is commonly called a rescue. (g) If a party in the custody of the law secure

(a) *Reg. v. Russell*, 5 U. C. L. J. N. S. 132, per Cockburn, C. J.; 17 W. R. 402.

(b) Russ. Cr. 573; *Rex v. Robinson*, 2 Burr, 799-800.

(c) *Rex v. Harris*, 4 T. R. 202; 2 Leach 549.

(d) *Rex v. Balme*, Cowp., 650; *Rex v. Fearnley*, 1 T. R. 316; *Reg. v. Gould*, 1 Salk, 381; Russ. Cr. 574.

(e) *Ib.* 575; *Rex v. Gash*. 1 Starkie, 41.

(f) Russ. Cr. 581.

(g) *Ib.* 581.

his own escape, though without force, he is guilty of a high contempt, and punishable by fine and imprisonment. (a) If a prisoner go out through an open door of his gaol, without using any force or violence, he is guilty of a misdemeanor; and it seems any person aiding him in such escape is punishable as for a misdemeanor at common law. (b) In order that an officer may be liable for an escape, the party must be actually arrested, and legally imprisoned for some criminal matter. (c) The imprisonment must also be continuing at the time of the escape, and its continuance must be grounded on that satisfaction which the public justice demands for the crime committed. (d) A *voluntary* escape is where an officer, having the custody of a prisoner, charged with and guilty of a capital offence, knowingly gives him his liberty, with intent to save him either from his trial or execution. By this offence, the officer is involved in the guilt of the same crime of which the prisoner is guilty, and for which he was in custody. A *negligent* escape is where the party arrested or imprisoned escapes against the will of him that arrests or imprisons him, and is not freshly pursued, and taken again, before he has been lost sight of. (e)

In the case of a voluntary escape, the officer has no more right to re-take the prisoner than if he had never had him in his custody; but in case of negligent escape, if the party make fresh pursuit, he may re-take the prisoner at any time afterwards, whether he finds him in the same or a different county.

One W. was brought before Magistrates, in the custody of the defendant, a constable, to answer a charge of misdemeanor; and after witnesses had been examined, he

(a) Russ. Cr. 281.

(b) Russ. Cr. 581; *Reg. v. Allan*, 1 C. & Mar. 295.

(c) Russ. Cr. 582.

(d) *Ib.* 583.

(e) Russ. Cr. 583-4.

was verbally remanded until the next day. Being then brought up again, and the examination concluded, the Justices decided to take bail, and send the case to the assizes. The prisoner said he could get bail, if he had time to send for them, and the Justice verbally remanded him until the following day, telling the defendant to bring him up then, to be committed or bailed. On that day, the defendant negligently permitted him to escape, for which he was convicted:—*Held* that W. was not in the custody of the defendant merely for the purpose of enabling him to procure bail, but under the original warrant, and the matter still pending before the Magistrates, until finally disposed of by commitment to custody, or discharged on bail, and that the conviction was proper. (a)

When a Sheriff refuses to produce a prisoner in his custody within twenty-four hours after notice, it is an escape, for which an action of debt will lie. (b)

It is the duty of the Sheriff of the county in which a city is, and not of the High Bailiff of such city, to convey to the penitentiary prisoners sentenced at the Recorder's Court. (c)

It seems that from the moment a prisoner is arrested, until he has actually expiated his offence by serving the full time of imprisonment, he is in the custody of the law for the purposes of the foregoing offences and a person in any way aiding in his escape, before full atonement made, becomes *particeps criminis*. (d)

*Prison breach* seems now to be an offence of the same degree as that for which the party was confined. (e) Imprisonment is no more than a restraint of liberty, and

(a) *Reg. v. Shuttleworth*, 22 U. C. Q. B. 372.

(b) *Wragg v. Jarvis*, 4 U. C. Q. B. O. S. 317.

(c) *Glass v. Wigmore*, 21 U. C. Q. B. 37.

(d) See *Russ. Cr.* 607.

(e) See 1 Edw. 2 Stat. 2.

any place, in which a party may be lawfully confined is a prison within this statute, for it extends to a prison in law as well as a prison in deed. (a) There must be an *actual breaking* of the prison and not such force and violence only as may be implied by construction of law. (b) The breaking need not be intentional (c); but it must not be from the necessity of an inevitable accident happening without the contrivance or fault of the prisoner. (d) The Prison Act 1865, 28 & 29 Vic. c. 126, s. 37, which prohibits the conveyance into any prison, with intent to facilitate the escape of a prisoner, of certain articles or "any other article or thing," includes a crowbar under the latter words. (e)

*Parliamentary Offences.*—Members of either House of Parliament are not criminally liable for any statements made in the House, nor for a conspiracy to make such statements. (f) An order for an attachment against a member of parliament is illegal and may be set aside though no proceedings have been taken upon it, by the issue of the process or otherwise. (g) So the writ may be set aside before the defendant is actually arrested upon it. (h) A member of parliament is not liable for the penalty imposed by the Con. Stat. Can. c. 3, s. 7, for sitting and voting without having the property qualification required by law. The penalty is only exigible from a person whose incapacity to become a member is decreed by s. 5. and whose election is radically null and void. (i) Members of provincial parliaments are privileged from arrest in civil cases for a period of forty days, after the proro-

(a) Russ. Cr. 592.

(b) *Ib.* 594.

(c) *Rex v. Haswell*, Russ. & Ry. 458.

(d) Russ. Cr. 594.

(e) *Reg. v. Payne*, L. R. 1 C. C. R. 27; 35 L. J. (M. C.) 170.

(f) *Ex parte Wason*, L. R. 4 Q. B. 573.

(g) *Reg. v. Gamble*, 1 U. C. P. R. 222.

(h) *Ib.*

(i) *Morasse v. Guevremont*, 5 L. C. J. 113.

gation or dissolution of parliament and for the same period before the next appointed meeting. (a) They have the same privileges in this respect as members of parliament in England (b) But this privilege of exemption from arrest only extends to civil matters. In cases of treason, felony, refusing to give surety of the peace, all indictable offences, forcible entries or detainers, libels, printing and publishing seditious libels, process to enforce *habeas corpus* contempts for not obeying civil process if that contempt is in its nature or its incidents criminal, and generally in all criminal matters there is no privilege of exemption from arrest. (c) A member of a provincial parliament held at Quebec, the place where he is resident, arrested eighteen days after its dissolution for "treasonable practices", and, during his confinement, elected a member of a new parliament is not entitled to privilege from such arrest by reason of his election to either parliament. (d) On motion for a writ of *habeas corpus* to produce the body of a person claiming exemption from arrest on the ground of the privilege of parliament, two papers purporting to be two indentures of election are not sufficient evidence of his being such member, to warrant the granting of the writ. (e)

After conviction for breach of privilege, in case of libel, the court will not notice any defect in the warrant of commitment. (f)

A prisoner committed by the House of Assembly to the Common Gaol "during pleasure" is discharged by prorogation. (g)

(a) *Wadsworth v. Boulton*, 2 Chr. Rep. 76; *Rennie v. Rankin*, 1 Allen, 620; *Reg. v. Gamble*, 9 U. C. Q. B. 546.

(b) *Reg. v. Gamble*, *supra*; but see *Cuvillier v. Munro*, 4 L. C. R. 146.

(c) *Ib.* 552, per *Draper*, C. J.; *Long Wellesley's case*, Russ. & M., 639.

(d) *Re Bedard*, S. L. C. A. 1.

(e) *Ib.*

(f) *Re Tracy*, S. L. C. A. 478.

(g) *Ex parte Monk*, S. L. C. A. 120.

Courts of law cannot inquire into the cause of commitment by either House of Parliament, nor bail, nor discharge a person who is in execution by the judgment of any other tribunal ; yet if the commitment should not profess to be for a contempt, but is evidently arbitrary, unjust and contrary to every principle of positive law or natural justice, the court is not only competent but bound to discharge the party. (a)

The Courts have power to issue writs of *Habeas Corpus* in matters of commitment by either House of Parliament, and the commitment may be examined upon the return to the writ. (b) The Statutes 12 Vic. c. 27 and 14 & 15 Vic. c. 1, invest the House of Assembly with power to punish by imprisonment a deputy-returning-officer for malfeasance and breach of privilege. (c)

(a) *Ex parte Lavoie*, 5 L. C. R. 99.

(b) *Ib.*

(c) *Ib.*

## CHAPTER IV.

## OFFENCES AGAINST THE PERSON.

**Murder.**—Where a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and under the Queen's peace, with malice aforethought, either express, or implied by law, the offence is murder. (a)

Malice is a necessary ingredient in, and the chief characteristic of, the crime of murder. (b) The legal sense of the word malice as applied to the crime of murder is somewhat different from the popular acceptation of the term. When an act is attended with such circumstances as are the ordinary symptoms of a wicked, depraved and malignant spirit, a heart regardless of social duty, and deliberately bent upon mischief, the act is malicious in the legal sense. (c) In fact, malice, in its legal sense, means a wrongful act done intentionally, without just cause or excuse. (d) In general any formed design of doing mischief may be called malice, and, therefore, not such killing only as proceeds from premeditated hatred or revenge against the person killed, but also in many other cases, such killing as is accompanied with circumstances that shew the heart to be perversely wicked is adjudged of malice prepense and consequently murder. (e)

Malice is either express or implied. Express malice is when one person kills another with a sedate, deliberate

(a) Arch. Cr. Pldg. 623.

(b) See *Re Anderson*, 11 U. C. C. P. 62, per *Richards*, C. J.

(c) Russ. Cr. 667.

(d) *M'Intyre v. M'Bean*, 13 U. C. Q. B. 542, per *Robinson*, C. J.; *Poitvin v. Morgan*, 10 L. C. J., 97, per *Badgley*, J.

(e) Russ. Cr. 667.



mind and formed design, and malice is implied by law from any deliberate cruel act committed by one person against another, however sudden. (a)

On every charge of murder, where the act of killing is proved against the prisoner, the law presumes the fact to have been founded in malice, until the contrary appears. (b) The *onus* of rebutting this presumption, by extracting facts on cross-examination or by direct testimony, lies on the prisoner. (c)

Persons present at a homicide may be involved in different degrees of guilt; for where knowledge of some fact is necessary to make a killing murder, those of a party who have the knowledge will be guilty of murder, and those who have it not of manslaughter only. A felonious participation in the act without a felonious participation in the design will not make murder. Thus if A. assault B. of malice, and they fight, and A.'s servant come in aid of his master, and B. be killed, A. is guilty of murder, but the servant, if he knew not of A.'s malice, is guilty of manslaughter only. (d)

The person committing the crime must be a free agent, and not subject to actual force at the time the act is done. Thus if A. by force take the arm of B., in which is a weapon, and therewith kill C., A. is guilty of murder but not B. But a moral force, as a threat of duress or imprisonment or even an assault to the peril of life is no legal excuse. (e) But if A. commit the act through an irresponsible agent, as an idiot or lunatic, A. is guilty of murder as a principal. (f)

Murder may be committed upon any person within

(a) Russ. Cr. 667.

(b) *Reg. v. M'Dowell*, 25 U. C. Q. B. 112, per *Draper*, C. J.; *Reg. v. Atkinson*, 17 U. C. C. P. 304, per *J. Wilson*, J.

(c) *Ib.*; Russ. Cr. 669.

(d) *Ib.*; Russ. Cr. 669.

(e) *Ib.*

(f) *Ib.*

the Queen's peace ; and consequently to kill an alien enemy within the kingdom, unless in the heat and actual exercise of war, is as much murder as to kill a regular-born British subject. (a)

While an infant is in its mother's womb, and until it is actually born, it is not considered such a person as can be killed within the description of murder. (b) If a woman is quick with child and any person strike her, whereby the child is killed, it is not murder or manslaughter. By the 32 & 33 Vic., c. 20, s. 59, the unlawfully administering poison, or unlawfully using any instrument, with intent to procure miscarriage, is made an offence of the degree of felony, and, by s. 60, whoever unlawfully supplies or procures any drugs or other noxious thing for such purpose is guilty of a misdemeanor. A child must be actually born in a living state before it can be the subject of murder, (c) and the fact of its having breathed is not conclusive proof thereof. (d) There must be an independent circulation in the child before it can be accounted alive. (e) But the fact of the child being still connected with the mother by the umbilical cord will not prevent the killing from being murder. (f)

The killing may be effected by shooting, poisoning, starving, drowning or any other form of death by which human nature may be overcome. (g) But there must be some external violence or *corporal* damage to the party, and if a person, by working upon the fancy of another, or by harsh and unkind usage, puts him into such passion of grief or fear that he dies suddenly, or contracts some

(a) Russ. Cr. 670.

(b) *Ib.* 670 *et. seq.*

(c) *R. v. Poulton*, 5 C. & P. 329.

(d) *R. v. Sellis*, 7 C. & P. 850 ; 1 Mood. C. C. 850 ; *R. v. Crutchley*, 7 C. & P. 814.

(e) *R. v. Enoch*, 5 C. & P. 539 ; *R. v. Wright*, 9 C. & P. 754.

(f) *R. v. Crutchley*, *supra* ; *R. v. Reeves*, 9 C. & P. 25 ; *R. v. Trilloe*, 2 Mood. C. C. 260 ; Arch. Cr. Pldg. 625-6.

(g) Russ. Cr. 674.

disease which causes his death, the killing is not such as the law can notice (a)

No act whatsoever shall be adjudged murder unless the person die within a year and a day from the time the stroke was received or cause of death administered, in the computation of which the whole day on which the stroke was administered is reckoned the first. (b)

If a man has a disease which, in all likelihood, would terminate his life in a short time, and another gives him a wound or hurt which hastens his death, this will constitute murder, for to accelerate the death of a person is sufficient. (c) So if a man is wounded, and the wound turns to a gangrene or fever from want of proper applications or from neglect, and the man dies of the gangrene or fever, or if it becomes fatal from the refusal of the party to submit to a surgical operation; (d) this is also such a killing as constitutes murder, but otherwise if the death of the party were caused by improper applications to the wound, and not by the wound itself. (e)

If a person, whilst doing or attempting to do another act, undesignedly kill a man, if the act intended or attempted were a felony, the killing is murder; if unlawful but not amounting to felony, the killing is manslaughter. If a man stab at A. and by accident strike and kill B. it is murder, (f) and if A., intending to murder B., shoot at and wound C. supposing him to be B., he is guilty of wounding C. with intent to murder him, for he intends to kill the person at whom he shoots. (g)

When a man has received such a provocation as shows that his act was not the result of a cool, deliberate judg-

(a) Russ. Cr. 614.

(b) Russ. Cr. 700.

(c) Arch. Cr. Pldg. 625; *R. v. Martin*, 5 C. & P. 130.

(d) *Reg. v. Holland*, 2 M. & Rob. 351.

(e) Arch. Cr. Pldg. 625.

(f) *Reg. v. Hunt*, 1 Mood. C. C. 93; Arch. Cr. Pldg. 635.

(g) *Reg. v. Smith*, 2 U. C. L. J. 19; *Dears*, 559; 25 L. J. (M. C.) 29.

ment and previous malignity of heart, but was solely imputable to human infirmity, his offence will not be murder. (a) But mere words or provoking actions or gestures expressing contempt or reproach, unaccompanied with an assault upon the person, will not reduce the killing from murder to manslaughter, though if immediately upon such provocation the party provoked had given the other a box in the ear, or had struck him with a stick or other weapon not likely to kill, and had unfortunately and contrary to his expectation killed him, it would only be manslaughter. (b) The giving of repeated blows with a heavy stick would furnish some evidence of malice.

By the light of modern authorities all questions as to motive, intent, heat of blood, etc., must be left to the jury, and should not be dealt with as propositions of law. (c)

P. (the prisoner,) and D. (deceased), being brothers, were in the house of the latter, both a little intoxicated. D. struck his wife, and on P. interfering, a scuffle began. While it was going on D. asked for the axe, and when they let go, P. went out for it and gave it to him, asking what he wanted with it. D. raised it as if to strike P., and they again closed, when the wife hid the axe. When she came back P. was on the deceased choking him. The wife then pulled P. off. P. then got up, pulled off his coat, and went outside and squared himself and asked deceased to come out and fight, and said he was cowardly. Deceased went on to the doorstep and caught hold of the prisoner. They grappled and deceased fell undermost, prisoner on him. While the scuffle was going on D. struck P. twice. On getting up P. kicked him on the side and arm, and then ran across the garden, got

(a) See Russ. Cr. 711 *et seq.*

(b) *Reg. v. M'Dowell*, 25 U. C. Q. B. 112, per *Draper*, C. J.

(c) *Ib.* 115, per *Draper*, C. J.; *Reg. v. Eagle*, 2 F. & F. 827.

over a brush-fence into the road and dared D. three times to come on, saying the last time that he would not go back the same way as he came. D. seized a stick from near the stove, which had been used to poke the fire with, and ran towards P. In trying to cross the fence he fell to his knees, and P. came forward and took the stick out of his hand. He got up and as he went over the fence towards P.; the latter struck him on the head with it. The wife entreated him to spare her husband, but he struck him a second time when he fell, and again while on the ground from which he never rose. P., in answer to the wife, said D. was not killed, and refused to take him in, saying, "Let him lie there till he comes to himself." P. and deceased had lived on friendly terms as brothers should, except when under the influence of liquor. It was held that the evidence was sufficient to go to the jury to establish a charge of murder; that if the death had been caused by the kicks received before leaving the house the circumstances would have repelled the conclusion of malice, and the jury should have been so directed, but that whether what took place at the fence was under a continuance of the heat and passion created by the previous quarrel, was under the circumstances a question for the jury, and was to be determined by their finding or negating malice. (a)

Killing in a sudden quarrel, where the circumstances afford no ground for inferring malice, generally amounts to manslaughter only, but there are many authorities which establish that, in the case of a sudden quarrel, when the parties immediately fight, there may be circumstances indicating malice in the party killing, when the killing will be murder. (b)

(a) *Reg. v. M'Dowell*, 25, U. C. Q. B. 108.

(b) *Ib.* 114, per *Draper*, C. J.

The first count in the indictment alleged that the prisoner unlawfully and wilfully administered poison to F., with intent to do bodily harm, by means of which administering F. suffered bodily harm. The second count, founded on the 14 & 15 Vic., c. 19, s. 4, charged the prisoner with inflicting grievous bodily harm by administering poison with intent to do bodily harm. It was proved that the prisoner, being about to leave his situation as manager of a shop, put into a sugar basin, which he knew would be used by F. (his successor), for his tea, a quantity of croton oil (an acid poison); that F. used some of the sugar, and immediately became ill, and suffered so much agony as to cause alarm for his life. *Quære* whether the prisoner had been guilty of any misdemeanor, either at common law or by statute. Much discussion arose as to whether the facts of this case brought it within the Statute, which provides that if any person shall unlawfully and maliciously *inflict*, etc. The Court stated that, in consequence of the defendant having died since the argument, it had become unnecessary to deliver any judgment. (a)

A married woman having become pregnant by the prisoner, and having herself unsuccessfully endeavoured to procure a poison, in order to produce abortion, the prisoner, under the influence of threats by the woman of self-destruction if the means of producing abortion were not supplied to her, procured for her a poison, from the effects of which, having taken it for the purpose aforesaid, she died. The prisoner neither administered the poison, nor caused it to be administered, nor was he present when it was taken, but he procured and delivered it to the deceased, with a knowledge of the purpose to which the woman intended to apply it, and he

(a) *Reg. v. Hippinstale*, 5 U. C. L. J. 166.

was accessory before the fact to her taking it for **that** purpose:—*Held* that the prisoner was not guilty of **murder**. (a)

Where, on an indictment for murder, the evidence **of** the medical man who examined the body went to **show** that he had not at all examined the brain, and that **he** examined the organs of the abdomen, without **cutting** into any of them: that the fact of his having found **the** common carotid artery and jugular vein severed, **left** him in no doubt but that such severance had caused **the** death. Being asked, on cross-examination, if he **had** examined the cavity of the head, might not such **exami-**nation have revealed some other cause of death? **he** replied: "There might have been, but the probabilities are against it."

It was contended that the Crown was bound to give the best evidence the case admitted of as to the cause of death, and that, in the present advanced state of medical science, the Crown should have placed itself, by medical examination of the brain, in a position to negative, beyond all reasonable doubt, the hypothesis of death from any other cause than that alleged:—*Held* that the evidence was sufficient to justify a conviction. (b)

It was formerly necessary, in an indictment for murder, to set forth the manner in which, or the means by which, the death of the deceased was caused; and where an indictment charged the prisoner, being the mother of an infant of tender age, and unable to take care of itself, with feloniously placing it upon the shore of a river, in an exposed situation, where it was liable to fall into the water, and abandoning it there, with intent that it should perish, by means of which exposure the child fell into

(a) *Reg. v. Fretwell*, 9 U. C. L. J. 138; L. & C. 161; 31 L. J. (M. C.) 145.  
(b) *Reg. v. Downey*, 13 L. C. J. 193.

the river, and was suffocated and drowned, of which suffocation, etc., the child died:—*Held* that, to support the indictment, it was necessary to prove that the death was caused by drowning or suffocation. (a)

The 32 & 33 Vic., c. 20, s. 6, provides that it shall not be necessary, in any indictment for murder or manslaughter, to set forth the manner in which, or the means by which, the death of the deceased was caused; but it shall be sufficient, in any indictment for murder, to charge that the defendant did feloniously, wilfully, and of his malice aforethought, kill and murder the deceased; and it shall be sufficient, in any indictment for manslaughter, to charge that the defendant did feloniously kill and slay the deceased.

It is necessary, in an indictment for murder, to state that the act by which the death was occasioned was done feloniously, and especially that it was done of malice aforethought, and it must also be stated that the prisoner murdered the deceased. (b)

The word “murder” in the indictment is emphatically a term of art, (c) and it would be insufficient, in an indictment for murder, to state that the party did wilfully, maliciously, and feloniously, stab and kill, because it is equally indispensable to use the artificial term “murder” as it is to state that the offence was committed of “malice aforethought.” The omission of either one of these expressions would render the prisoner liable to a conviction for manslaughter only. (d)

In an indictment for wounding, with intent to murder, the offence must be charged to have been committed by the prisoner wilfully, maliciously, and of his malice afore-

(a) *Reg. v. Fennety*, 3 Allen, 132.

(b) *Re Anderson*, 11 U. C. C. P. 62, per *Richards*, C. J. See also 32 & 33 Vic. c. 29, s. 27, and Sched. A.

(c) *Ib.* 69.

(d) *Ib.* 53.



thought, and judgment will be arrested when the indictment is defective in this respect. (a)

The punishment of murder is death. (b) C. 29 of this Act, s. 106, *et seq.* prescribe the manner in which sentence of death is to be executed.

*Manslaughter.*—The general definition of manslaughter is the unlawful and felonious killing of another, without any malice, either express or implied. (c) It is of two kinds:—(1) Involuntary manslaughter, where a man doing an *unlawful* act, not amounting to felony, by accident kills another, or where a man, by culpable neglect of a duty imposed upon him, is the cause of the death of another. (2) Voluntary manslaughter is where, upon a sudden quarrel, two persons fight, and one of them kills the other, or where a man greatly provokes another, by some personal violence, etc., and the other immediately kills him. (d)

Manslaughter is distinguished from murder in wanting the ingredient of malice; and it may be generally stated that, where the circumstances negative the existence of malice, in the legal sense, and the killing is unlawful and felonious, it will amount to manslaughter.

In a case where the deceased, who complained of being robbed suddenly, and, without authority or license, entered the house where the prisoner lodged. The latter was in a bed-room below stairs, not armed with any deadly weapon, but having the fragment of a brick, and the back of a chair, in his hands. He then immediately retreated up stairs, and the deceased asked the prisoner, who was standing at the top of the stairs, if he had got his (deceased's) money, to which the prisoner

(a) *Kerr v. Reg.*, 2 Rev. Critique, 238.

(b) 32 & 33 Vic. c. 20, s. 1.

(c) *Re Anderson*, 11 U. C. C. P. 63, per *Richards*, J.

(d) *Arch. Cr. Pldg.* 623.

replied : " If you come bothering me about your money, I will do something to you," and immediately threw out of his hand a piece of iron, about four or five feet long, being the handle of a frying-pan, which struck the deceased on the head, and fractured his skull. The whole transaction occupied only a few seconds, and was done in passion. In the opinion of the Judges, this was only a case of manslaughter. (a)

The general doctrine seems well established, that that which constitutes murder, when of malice aforethought, constitutes manslaughter when arising from culpable negligence. (b) And it would seem that the doctrine of contributory negligence cannot apply so as to justify the prisoner. (c)

It is culpable negligence for one who has a right to turn out horses on a common, intersected by public paths, which he knows are unenclosed, to turn out a vicious horse, knowing the propensities of the animal to kick, so that it may kick persons passing along or close to the paths on the common; and where a child, standing upon a common, close to a public path, was kicked by a vicious horse so turned out, and death ensued, the prisoner, who turned him out, was held guilty of manslaughter. It would seem that if the child, at the time she was kicked, had been upon a part of the common more remote from the path, the prisoner's offence would have been the same, *sed quære* as to this. (d)

The case for the prosecution was that the deceased, being the domestic servant of the prisoner, who kept a lodging-house, had died in consequence of insufficient

(a) *Reg. v. Kennedy*, 2 Thomson, 203.

(b) *Reg. v. Hughes*, 3 U. C. L. J., 153; 29 L. T. Rep. 266; Dears. & B. 248; 26 L. J. (M. C.) 202.

(c) See *Reg. v. Dant*, *infra*; *Reg. v. Swindall*, 2 C. & K. 230; *Reg. v. Hutchinson*, 9 Cox, 555; but see *R. v. Berchall*, 4 F. & F. 1087.

(d) *Reg. v. Dant*, 13 W. R. 663; L. & C. 567; 34 L. J. (M. C.) 119.

food and unwholesome lodging provided for her by the prisoner, or of the combined effect of those things, and a course of ill-treatment. It appeared, upon the evidence, that the deceased was a person of low intellect, and who had lived for about eighteen months in the service of the prisoner; that during the whole of that time she had been very cruelly treated, badly lodged, and badly fed, by the prisoner; that on the 21st of February, 1865, she had been taken to her aunt's by a person who was not called as a witness, and had died in the workhouse, on the 27th of the same month, from the effects of insufficient nourishment. But it also appeared that she was twenty-three years of age when she entered the prisoner's service; that she had acted rationally as a servant, and had occasionally gone out on errands; that in August her aunt had given the prisoner warning for her, but that, upon the prisoner saying that she had agreed to stay on, her mother and aunt had allowed her to do so; that she was about, and opened the door to a witness, on the 13th of February; and that, when she came to her aunt's, on the 21st of February, she was on foot. The Judge, in summing up, drew the attention of the jury to the distinction between the cases of children, apprentices and lunatics, under the care of persons bound to provide for them, and the case of a servant of full age, and directed them that, if they were satisfied upon the evidence that the prisoner had culpably neglected to supply sufficient food and lodging to the deceased during a time when, being in the prisoner's service, she was reduced to such an enfeebled state of body and mind as to be helpless, or was under the dominion and restraint of the prisoner, and unable to withdraw herself from her control, and that her death was caused or accelerated by such neglect, they might find her guilty:— *Held* that the direction was

right, but that the conviction must be quashed, for that it appeared that the proximate cause of the death of the deceased, for which only the prisoner, on this indictment, would be responsible, was the insufficient supply of food, and that the prisoner was not criminally responsible for that, as there was no sufficient evidence that the deceased had lost the exercise of her free will, and was unable to withdraw herself from her mistress's dominion and control. (a)

The prisoner was convicted on an indictment which charged him with neglecting to provide food and clothing for his child, but omitted specifically to allege his ability to do so :—*Held* that the ability to provide was implied, and therefore sufficiently averred in the use of the word "neglect." (b)

Where in an indictment of a single woman, the mother of a bastard child, for neglecting to provide it with sufficient food, it was alleged that she neglected her duty, "during all the time aforesaid being able and having the means to perform and fulfil the said duty" and as to that allegation, the evidence was that she was cohabiting with a man who was not the father and there was no evidence of her actual possession of means for nourishing the child, but it was proved that she could have applied to the relieving officer of the Union and that, if she had done so, she would have received relief adequate to the support of the child and herself :—*Held*, that the allegation was not proved, and that the conviction could not be supported. (c)

Deceased, immediately after being struck by the prisoner, had walked two miles to the police barrack, and ridden home a distance of four miles, the next morning.

(1) *Reg. v. Charlotte Smith*, 13 W. R. 816; 1 U. C. L. J. N. S. 164.

(b) *Reg. v. Ryland*, L. R. 1 C. C. R. 99; 37 L. J. (M. C.) 10.

(c) *Reg. v. Chandler*, 1 U. C. L. J. 135; Dears. 453; 24 L. J. (M. C.) 109.

The doctor stated that the re-action caused by this **walking** and riding accelerated the death of the deceased; that **but** for such exercise deceased would have had a better **chance** of recovery; that deceased died of compression of the **brain**; that the blow was alone sufficient to cause such **compression**, but that deceased was more likely to recover, if he had not so walked or ridden:—*Held* that the Judge was right in directing the jury that, if they believed the doctor's evidence, they should find the prisoner guilty. (a)

If a man kill an officer of justice, either civil or **criminal**, such as a bailiff, constable, etc., in the legal execution of his duty, or any person acting in aid of him whether specially called thereunto or not, or any private person endeavouring to suppress an affray or apprehend a felon knowing his authority or the intention with which he interposes, the law will imply malice and the offender will be guilty of murder. (b) But the officer must have a legal authority and execute it in a proper manner, and the defendant must have knowledge of that authority and intention. (c)

The 32 & 33 Vic. c. 29, s. 2 empowers, a constable or peace officer to apprehend without warrant, any person found committing an offence punishable either by indictment or upon summary conviction. Where a person was supposed to have obtained money by false pretences at 1 P. M. and was not arrested until 10 P. M.: *Held* that the party was "found committing" the offence at 1 P. M. and might be arrested, when found committing or after a pursuit immediately commenced. But "immediately" means after the commission of the offence and not after its discovery for the intention of the Statute was that the

(a) *Reg. v. Flynn*, 16 W. R. 319.

(b) *Arch. Cr. Pldg.* 640.

(c) *Ib.*

criminal should be apprehended immediately on the commission of the offence. (a)

A person found committing an offence against the Larceny Act, 32 & 33, Vic. c. 21, may be immediately apprehended by any person without a warrant, provided, according to the rule laid down in *Herman v. Seneschal*, (b) and adopted in *Roberts v. Orchard*, (c) the person so apprehending honestly believes in the existence of facts which, if they existed, would have justified him under the statute, 24 & 25 Vic., c. 96. s. 103. It is not necessary that an offence should have been committed under the statute by any one; but the belief must rest on some ground and mere suspicion will not be enough. (d)

The Police Act (N.B.) 11 Vic. c. 13 s. 22 does not authorize the arrest without warrant of known residents of the place. (e)

In *King v. Poe*, (f) it was left undecided and in doubt whether a Magistrate has a right to arrest a person for a misdemeanor committed in his view. Where there has been no breach of the peace, actual or apprehended, a Magistrate has no right to detain a known person to answer a charge of misdemeanor, verbally intimated to him, without a regular information before him in his capacity of Magistrate that he may be able to judge whether it charges any offence to which the party ought to answer. (g)

Where a Magistrate allows a prisoner to depart, without examining into the charge against him, with a direction to appear the next morning at the police office, and in the meantime, on the ground that he was assaulted by the

(a) *Downing v. Capel*, L. R. 2 C. P. 461.

(b) 11 W. R. 184; 13 C. B. N. S. 392.

(c) 12 W. R. 253; 2 H. & C. 768.

(d) *Leete v. Hart*, 4 U. C. L. J. N. S. 201.

(e) *Foley v. Tucker*, 1 Hannay, 52.

(f) 15 L. T. Rep. N. S. 37.

(g) *Cudde v. Ferguson*, 1 Q. B. 889; *Rex v. Birnie*, 1 M. & R. 160.

prisoner, when in custody before him the previous evening, gives verbal instructions to a constable to apprehend him and take him to the station house or gaol, such imprisonment is illegal and the Magistrate cannot justify the arrest. (a) Under the 1 Vic. c. 21, it is illegal in a Magistrate to cause the arrest of a party in the first instance, he must be first summoned before him. (b)

Where a defendant has been brought before one Magistrate and bailed by him, although a statute may require the presence of three to convict the prisoner—a second arrest for the same charge by the same complainant before the time appointed for the hearing is illegal. (c)

A constable may arrest any one for a breach of the peace committed in his presence, not merely to preserve the peace, but for the purposes of punishment. (d)

Where a policeman saw a man, who was drunk, assault his wife, and within twenty minutes after took him into custody :—*Held* that the policeman was justified in so doing, notwithstanding that the man had left the spot, where his wife was saying he should “leave her altogether.” (e)

A constable may arrest a person without a warrant upon a reasonable charge, that is upon probable information that he has committed a crime. (f)

It would appear that a constable has nothing to do *virtute officii* in a civil proceeding, and he can have no colour or pretence for acting without authority specially given by some process (g)

It is the duty of a person arresting any one on suspicion of felony to take him before a Justice of the Peace

(a) *Powell v. Williamson*, 1 U. C. Q. B. 154.

(b) *Croukhile v. Sommerville*, 3 U. C. Q. B. 129.

(c) *King v. Orr*, 5 U. C. Q. B. O. S. 724.

(d) *Deercourt v. Corbishley*, 1 U. C. L. J. 156.

(e) *Reg. v. Light*, 4 U. C. L. J. 97; *Dears. & B.* 332; 27 L. J. (M. C.) 1.

(f) *Rogers v. Van Valkenburgh*, 20 U. C. Q. B. 219, per *Robinson*, C. J.

(g) See *Brown v. Shea*, 5 U. C. Q. B. 143, per *Robinson*, C. J.

as soon as he reasonably can ; and the law gives no authority, even to a Justice of the Peace, to detain a person suspected but for a reasonable time till he may be examined. (a) A private person not being by office a keeper of the peace or a Justice or constable cannot arrest on suspicion of felony without a warrant, but must shew a felony actually committed. (b)

But if a person is prepared to shew that there really has been a felony committed by some one, then he may justify arresting a particular person upon reasonable grounds of suspicion that he was the offender. (c) The general rule would seem to be that, at common law, if a felony were actually committed, a person might be arrested without a warrant by any one, if he were reasonably suspected of having committed the felony ; and if a constable had reasonable grounds for supposing that a felony had been committed, and reasonable grounds for assuming that a certain person had committed the supposed felony, he might arrest him, though no felony had actually been committed. (d) Neither a constable nor any other could arrest a person merely on suspicion of his having illegally detained goods. (e)

A clerk in the service of a railway company, whose duty it is to issue tickets to passengers and receive the money, and keep it in a till under his charge, has no implied authority from the company to give into custody a person whom he suspects has attempted to rob the till, after the attempt has ceased, as such arrest could not be necessary for the protection of the company's property. (f) It would seem that, if a man in charge of a till

(a) *Ashley v. Dundas*, 5 U. C. Q. B. O. S. 754, per *Sherwood*, J.

(b) *Ib* ; *M'Kenzie v. Gibson*, 8 U. C. Q. B. 100.

(c) *Ib*. 102, per *Robinson*, C. J.

(d) *Hadley v. Perks*, L. R. 1 Q. B. 456, per *Blackburn*, J.

(e) *Ib*.

(f) *Allen v. L. & S. W. Ry. Co.* L. R. 6 Q. B. 65.



were to find that a person was attempting to rob it, and he could not prevent him from stealing the property, otherwise than by taking him into custody, the person in charge of the till might have an implied authority from his employer to arrest the offender; or if the clerk had reason to believe the money had been actually stolen and he could get it back by taking the thief into custody, and he took him into custody with a view of recovering the property taken away, that also might be within the authority of a person in charge of the till. But there is a marked distinction between an act done for the purpose of protecting the property by preventing a felony or of recovering it back, and an act done for the purpose of punishing the offender for that which has already been done. The person having charge, etc., has no implied authority to take such steps as may be necessary for the purpose of punishing the offender. The principle governing the subject is: there is an implied authority to do all those things that are necessary for the protection of property entrusted to a person, or for fulfilling the duty which a person has to perform. (a)

Where a man is himself assaulted by a person, disturbing the peace in a public street, he may arrest the offender and take him to a peace officer to answer for a breach of the peace. (b)

The fact that a party is violently assaulting the wife and child of another is no legal justification for the latter, not being a peace officer, breaking into the house of the former in order to prevent the breach of the peace. (c)

The prisoner assaulted a police constable in the execution of his duty. The constable went for assistance and,

(a) *Allen v. L. & S. W. Ry. Co.* L. R. 6 Q. B. 68-9, per *Blackburn*, J.

(b) *Forrester v. Clarke*, 3 U. C. Q. B. 151.

(c) *Rockwell v. Murray*, 6 U. C. Q. B. 412; *Handcock v. Baker*, 2 B. & P. 262.

after an interval of an hour, returned with three other constables, when he found that the prisoner had retired into his house, the door of which was closed and fastened; after another interval of fifteen minutes, the constable forced upon the door, entered and arrested the prisoner who wounded one of them in resisting his apprehension: *Held* that as there was no danger of any renewal of the original assault and as the facts of the case did not constitute a fresh pursuit the arrest was illegal. (a)

A person unlawfully in another's house, and creating a disturbance and refusing to leave the house, may be forcibly removed, but, if he had not committed an assault, the circumstances do not afford a justification for giving him into the custody of a policeman. (b)

In all cases above mentioned, if the officer has not a legal authority or executes it in an improper manner, the offence will be manslaughter only. But if there is evidence of express malice it will amount to murder. (c) So ignorance of the character in which the officer is acting, will reduce the offence to manslaughter. But if a constable command the peace or shew his staff of office, this, it seems, is a sufficient intimation of his authority. (d)

Where the fact of killing is proved, the defendant may rebut the presumption of malice arising therefrom, by proving that the homicide was justifiable or excusable.

Justifiable homicide is of three kinds :—1. Where the proper officer executes a criminal in strict conformity with his sentence. 2. Where an officer of justice, or other person acting in his aid in the legal exercise of a particular duty, kills a person who resists or prevents him from executing it. 3. Where the homicide is committed

(a) *Reg. v. Marsden*, L. R. 1 C. C. R. 131; 37 L. J. (M. C.) 80.

(b) *Jordan v. Gibbon*, 3 F. & F. 607.

(c) Arch. Cr. Pldg. 645-6.

(d) *Ib.* 645; and see *Rez v. Higgins*, 4 U. C. Q. B. O. S. 83.

in prevention of a forcible and atrocious crime, as, for instance, if a man attempts to rob or murder another and be killed in the attempt, the slayer shall be acquitted and discharged. (a)

Execusable homicide is of two kinds:—1. Where a man, doing a lawful act, without any intention of hurt, by accident kills another, as, for instance, where a man is working with a hatchet, and the head by accident flies off and kills a person standing by. This is called homicide *per infortunam* or by misadventure. 2. Where a man kills another, upon a sudden encounter, merely in his own defence, or in defence of his wife, child, parent, or servant, and not from any vindictive feeling, which is termed homicide *se defendendo*, or in self defence. (b)

The 32 & 33 Vic., c. 20, s. 7, provides, that no punishment or forfeiture shall be incurred by any person who kills another by misfortune, or in his own defence, or in any other manner, without felony.

The 32 & 33 Vic., c. 20, s. 61, enacts that, if any woman is delivered of a child, every person who, by any secret disposition of the dead body of the said child, whether such child died before, at, or after its birth, endeavours to conceal the birth thereof, is guilty of a misdemeanor.

A secret disposition, under this Act, must depend upon the circumstances of each particular case; and the most complete exposure of the body might be a concealment, as, for instance, if the body were placed in the middle of a moor in the winter, or on the top of a mountain, or in any other secluded place, where it would not likely be found. The jury must, in each case, say whether or no

(a) Arch. Cr. Pldg. 623.

(b) *Ib.* 623.

the facts shew that there has been such a secret disposition. (a)

Where it appeared that the prisoner put the dead body of her child over a wall, four and a-half feet high, which divided a yard from a field. The yard was at the back of a public-house, and was used by the occupiers of that and three other houses. There was no thoroughfare into or through the yard, and no entrance into it, except by a narrow passage through the street. The prisoner did not live in any of the four houses that had the use of the yard, and she must have passed from the street into the yard, in order to throw the body over the wall. A person looking over the wall from the yard would see body; but persons going through the yard, or using it in the ordinary way, would not see the body. The field was a grass field, used by a butcher for grazing. It had no gate, except from the butcher's yard, and there was no public path through the field, nor any path in the field, that would take any one within sight of the body. No person going into the field, in their ordinary occupation, would go near the body, or see it, nor would they see it unless they went up to the part of the wall where the body lay. The body was found by chance, by a child who was picking up flowers in the field, and went accidentally to the wall. There was nothing on or over the body, and nothing to conceal it, except its situation:—*Held* that, under the Statute, there was evidence to go to the jury of a "secret disposition" of the body. (b)

If a woman endeavour to conceal the birth of her child, by placing the dead body under the bolster of a bed, and laying her head partly over the body, intending to remove

(a) *Reg. v. Brown*, L. R. 1 C. C. R. 246-7; 39 L. J. (M. C.) 94, per Bovill, C. J.

(b) *Ib.* 244.

it to some other place when an opportunity offers, it is an offence within 9 Geo. 4, c. 31, s. 14. (a)

Upon an indictment under 7 Wm. 4, and 1 Vic., c. 85, s. 6, for causing abortion, it was proved that the woman requested the prisoner to get her something to procure miscarriage, and that a drug was both given by the prisoner, and taken by the woman, with that intent, but the taking was not in the presence of the prisoner. It, however, produced miscarriage :—*Held* that a conviction upon the facts above was right, and that there was an “administering and causing to be taken,” within the Statute, though the prisoner was not present at the time. (b)

*Rape*.—This offence has been defined to be the having unlawful and carnal knowledge of a woman by force, and against her will. (c)

Upon an indictment for rape, there must be some evidence that the act was without the consent of the woman, even where she is an idiot. Where there is no appearance of force having been used to the woman, and the only evidence of the connection is the prisoner's own admission, coupled with the statement that it was done with her consent, there is no evidence for the jury. (d) Where the woman consents to the connection, even though her consent is obtained by fraud, the act does not amount to rape.

A woman, while in bed with her husband, permitted the prisoner, under the belief that he was her husband, to have connection with her :—*Held* that, in the absence of proof that she was asleep, or unconscious, at the time the act of connection commenced, it must be taken that

(a) *Reg. v. Perry*, 1 U. C. L. J. 135 ; *Dears.* 471 ; 24 L. J. (M. C.) 137.

(b) *Reg. v. Wilson*, 3 U. C. L. J. 19 ; *Dears. & B.* 127 ; 26 L. J. (M. C.) 18  
See also *Reg. v. Farrow* ; *Dears. & B.* 164.

(c) *Russ. Cr.* 904.

(d) *Reg. v. Fletcher*, L. R. 1 C. C. R. 39 ; 35 L. J. (M. C.) 172.

her consent was obtained by fraud, and that the prisoner's act did not amount to rape. (a)

Having connection with a woman, under circumstances which induce her to believe that it is her husband, is not a rape. (b) But, in such case, the party is liable to be indicted for an assault. (c)

The meaning of the phraseology in an indictment for rape that the prisoner "violently, and against her will, feloniously did ravish" the prosecutrix, is, that the woman has been quite overcome by force or terror, accompanied with as much resistance on her part as is possible under the circumstances, and so as to make the ravisher see and know that she is really resisting to the uttermost. (d)

Where, on an indictment for rape, the evidence of the prosecutrix shewed that the prisoner, having followed her into the house, and, without her knowledge, bolted the door, succeeded, after she had several times escaped from him, in dragging and throwing her upon the bed, where he had connection with her, she making several attempts to get up, but being too exhausted to do so, the prisoner avowing that he had come on purpose, and, as she was in his power, he would do as he pleased; that she resisted as long as she could, and then, before he had effected his purpose, screamed out, and called to her child, who was outside; being corroborated as to the screams by the child, and by another witness, who heard cries, manifestly those of the prosecutrix; it also appearing that the husband of the prosecutrix had received a letter from her, on the 20th of the same month in which the rape was said to have been committed, which, it was alleged, was on the 17th of that month, stating that the

(a) *Reg. v. Barrow*, L. R. 1 C. C. R. 156; 38 L. J. (M. C.) 20.

(b) *Reg. v. Francis*, 13 U. C. Q. B. 116.

(c) *R. v. Saunders*, 8 C. & P. 265; *R. v. Williams*, *ib.* 286

(d) *Reg. v. Fick*, 16 U. C. C. P. 379.

prisoner had been at his house, and abused her :—*Held* that this evidence shewed the woman was quite overcome by force or terror, accompanied with as much resistance on her part as was possible under the circumstances, and so as to have made the ravisher see and know that she really was resisting to the utmost, and sustained the language of the indictment, that the prisoner “violently, and against her will, feloniously did ravish” the prosecutrix. A conviction for rape was therefore upheld. (a)

In this case, the facts, as they appeared in evidence, were left to the jury, who were told that they must be satisfied, before convicting him, that the prisoner had had connection with the prosecutrix, “with force and violence, and against her will,” and further, that “some resistance should be made, on the part of the woman, to shew that she really was not a consenting party.” The Court, believing that all the substantial facts which should have been submitted to the jury, by way of direction, were submitted to them, held the direction proper. (b)

The prisoner forcibly had carnal knowledge of a girl thirteen years of age, who, from defect of understanding, was incapable of giving consent, or exercising any judgment in the matter :—*Held* that he was guilty of rape, and that it was sufficient, in such a case, to prove that the act was done without the girl’s consent, though not against her will. (c)

But in the case of rape of an idiot, or lunatic woman, the mere proof of the act of connection will not warrant the case being left to the jury. There must be some evidence that it was without her consent, *e. g.* that she

(a) *Reg. v. Fick*, 16 U. C. C. P. 379.

(b) *Ib.*

(c) *Reg. v. Fletcher*, 5 U. C. L. J. 143; Bell, 63; 28 L. J. (M. C.) 85.

was incapable of expressing consent or dissent, or from exercising any judgment upon the matter, from imbecility of mind, or defect of understanding, and if she gave her consent, from animal instinct or passion, it would not be a rape. (a)

Where the charge was of assault, with intent to ravish, and the woman was insane, and there was no evidence as to her general character for chastity, or anything to raise a presumption that she would not consent, and the jury were directed that, if she had no moral perception of right and wrong, and her acts were not controlled by the will, she was not capable of giving consent, and the yielding on her part, the prisoner knowing her state, was not an act done with her will. The jury having convicted, saying she was insane, and consented, it was held that the conviction could not be sustained; for in the principal offence consent, from mere animal instinct, is a defence, even in the case of an idiot, and it is equally so in the lesser charge of assault, with intent to commit rape, particularly as there is no Act of Parliament declaring the fact of criminal connection with an idiot or lunatic to be an offence, as in the case of children of tender years. (b)

A child, under ten years of age, cannot give consent to any criminal intercourse, so as to deprive that intercourse of criminality, under the 32 & 33 Vic., c. 20, s. 51. (c) And a person may be convicted of attempting to have carnal knowledge of such child, even though she consents to the acts done. (d) But her consent will render the attempt no assault. (e)

(a) *Reg. v. Connolly, supra*, 317.

(b) *Ib.*

(c) *Ib.* 320, per *Hagarty, J.*

(d) *Reg. v. Beale*, L. R. 1 C. C. R. 10; 35 L. J. (M. C.) 60.

(e) *Reg. v. Cockburn*, 3 Cox, 543; *Reg. v. Connolly, supra*, 320, per *Hagarty, J.*



In the case of a child under ten years of age, if the indictment be for the misdemeanor of attempting to commit the statutable felony, consent becomes unimportant; and in such case, on an indictment for the principal offence, there cannot be a conviction for the assault, if there be consent to what was done, nor for an assault independently charged. (a)

In the case of girls from ten to twelve, on a charge of assault, with intent to carnally know, or indecent assault, or common assault, consent is a defence; but the prisoner may be indicted for attempting to commit the statutable misdemeanor, not charging an assault, in which case it seems consent is a defence. The proper course is to indict for attempt to commit the statutable misdemeanor, for every attempt to commit a misdemeanor is a misdemeanor, and where the essence of the offence charged is an assault, the attempt, though a misdemeanor, is no assault. (b)

By the 32 & 33 Vic., c. 20, s. 65, it is unnecessary, with respect to these offences, to prove the actual emission of seed, in order to constitute a carnal knowledge; but the carnal knowledge shall be deemed complete on proof of any degree of penetration only.

In a case of rape, a statement made by the prosecutrix to her husband and another person, that the defendant ravished her, is not admissible, so far as it criminales the prisoner. (c)

The 32 & 33 Vic., c. 20, s. 56, provides that whosoever unlawfully takes, or causes to be taken, any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or

(a) *Reg. v. Connolly*, 26 U. C. Q. B. 323, per *Hagarty*, J.

(b) *Ib.* 323, per *Hagarty*, J. See also *Reg. v. Guthrie*, L. R. 1 C. C. R. 241; 39 L. J. (M. C.) 95; *Reg. v. Oliver*; Bell 287; 30 L. J. (M. C.) 12.

(c) *Reg. v. Fick*, 16 U. C. C. P. 379.

of any other person having the lawful care or charge of her, is guilty of a misdemeanor. A. met a girl in the street going to school and induced her to go with him to a town some miles distant, where he seduced her. They returned together, and he left her where he met her. The girl then went to her home where she lived with her father and mother, having been absent some hours longer than would have been the case if she had not met A. The latter made no enquiry, and did not know who the girl was, or whether she had a father or mother living or not, or that he was taking her out of her father's possession; but he had no reason to, and did not, believe that she was a girl of the town :—*Held*, that A. was not guilty of having unlawfully taken the girl out of the possession of her father, under the 24 & 25 Vic., c. 100, s. 55, which is analogous to our own Act, for it did not appear that the prisoner knew or had reason to believe that the girl was under the lawful care or charge of her father or mother or any other person. (a)

*Assault and Battery.*—An assault is an attempt or offer with force and violence to do a corporal hurt to another, and a battery, which is the attempt executed, includes an assault. (b) An assault is described as a violent kind of injury offered to a man's person of a more large extent than battery, for it may be committed by offering a blow. (c)

Whether the act shall amount to an assault must in every case be collected from the intention. If a person interfere in a fight to separate the combatants, this not amount to an assault. (d) So to lay one's hand gently on another whom an officer has a warrant to arrest, and

(a) *Reg. v. Hibbert*, L. R. 1 C. C. R. 184; 38 L. J. (M. C.) 61.

(b) *Reg. v. Shaw*, 23 U. C. Q. B. 619, per *Draper*, C. J.

(c) *M'Curdy v. Swift*, 17 U. C. C. P. 139, per *A. Wilson*, J.

(d) *Russ. Cr.* 1025.

to tell the officer that this is the man he wants is no battery. If the injury committed were accidental and undesigned it will not amount to a battery. (a)

Where A., without any hostile intention, pulled the arm of B., the superintendent of a fire-brigade, the moment the latter was engaged in directing the hose of the engine against a fire, for the purpose of calling his attention to an observation with respect to the effect of the water upon the flames:—*Held*, that this was not such an assault as would justify B. in giving A. into the custody of a policeman. (b) There can be no assault where the party consents to the act done (c)

On an indictment that the prisoner, in and upon one D., a girl above the age of ten years, and under the age of twelve years, unlawfully did make an assault, and her, the said D., did then unlawfully and carnally know and abuse against the form of the statute, etc. The offence of carnally knowing the girl was disproved, but there was evidence of an assault of an indecent and very violent character, which was left to the jury, who found the prisoner guilty of a common assault, and the question was whether they could properly do so upon this indictment:—*Held*, that the prisoner was properly convicted of a common assault, on the ground that the indictment charged two distinct misdemeanors, namely, an assault at common law, and the statutory offence of unlawfully and carnally knowing and abusing the girl; that there being a distinct charge of an assault in the indictment, the prisoner might be convicted of it though the indictment also contained a charge of a more serious offence,

(a) Russ. Cr. 1025.

(b) *Coward v. Baddeley*, 5 U. C. L. J. 262; 4 H. & N. 478; 28 L. J. (Ex.) 260.

(c) *Reg. v. Guthrie*, L. R. 1 C. C. R. 243; 39 L. J. (M. C.) 95, per *Borill*, C. J.; and see *Reg. v. Beale*, *ib.* 12, per *Pollock*, C. B.; *Reg. v. Connolly*, 26 U. C. Q. B. 320, per *Hagarty*, J.

consequently the prisoner might be found guilty of either offence. (a)

The prisoner was found guilty at the Quarter Sessions, on an indictment charging that she, on, etc., in and upon one B., in the peace of God and of our Lady the Queen, then being, unlawfully did make an assault and him, the said B., did beat and ill-treat with intent him, the said B., feloniously, wilfully, and of her malice aforethought, to kill and murder, and other wrongs to the said B. then did to the great damage of the said B., against the form of the statute in such case made and provided and against the peace, etc. A count was added for common assault. The evidence shewed an attempt to murder, but it was moved, in arrest of judgment, that the Sessions had no jurisdiction, for that it was a capital crime within the Con. Stats. Can., c, 91, s. 5 :—*Held*, that the indictment did not charge a capital offence under that section, nor an offence against any statute, but charged in each count an offence at common law, rejecting from the first count the words “contrary to the statute” as surplusage, and any other words which were insufficient to sustain a prosecution for felony under any statute, and that the conviction might be sustained as for an assault at common law. (b)

Using insulting and abusive language to a person in his own office and on the public street, and using the fist in a threatening and menacing manner to the face and head of a person, amounts to an assault. (c) A conductor on a train is not liable for an assault, under the Con. Stats. Can., c. 66. s. 106, in attempting to put a person off the cars who refuses, after being several times requested, to pay his proper fare ; the conductor, in en-

(a) *Reg v. Guthrie*, L. R. 1 C. C. R. 241.

(b) *Reg. v. M'Evoy*, 20 U. C. Q. B. 344.

(c) *Reg. v. Harmer*, 17 U. C. Q. B. 555 ; *Stephens v. Meyers*, 4 C. & P. 350.

deavouring to put the person off, being successfully resisted, and the person paying his proper fare on the conductor summoning others to his aid. (a)

The 32 & 33 Vic., c. 29, s. 51, provides that on the trial of any person for any felony whatever, where the crime charged includes an assault against the person, the jury may acquit of the felony and find a verdict of guilty of assault against the person indicted, if the evidence warrants such finding. It is quite clear that this section only authorizes a verdict of guilty of assault, when it is included in, and forms parcel of, the felony charged in the indictment. The words "crime charged" mean the crime charged as felony in the indictment for the enactment only takes effect upon an acquittal, and the assault, to fall within the Act, must be an integral part of the felony charged. (b)

On an indictment for murder the jury found the prisoner guilty of an assault only, and that such assault did not conduce to the death of the deceased :—*Held*, that the prisoner, under such finding, could not be convicted of the assault, under the (N. B.) 1 Rev. Stat. c. 149, s. 20, which authorizes a conviction of an assault, on a trial for murder, or manslaughter, or any felony including an assault. (c)

Where the prisoners were indicted for murder, and the medical testimony shewed burning to be the direct and only cause of the death, but there was no evidence to connect any of the prisoners with the burning, it was held that the prisoners could not be convicted of an assault, under the 32 & 33 Vic., c. 29, s. 51, for, although an

(a) *Reg. v. Faneuf*, 5 L. C. J. 167.

(b) *Reg. v. Dingman*, 22 U. C. Q. B. 283; *Reg. v. Bird*, 2 Den. C. C. 94.

(c) *Reg. v. Cregan*, 1 Hannay 36; and see *Reg. v. Ryan*, *ib.* 119, per *Ritchie*, C. J.

assault was proved, there was no evidence to shew that it conduced to the death. (a)

Nor is this rule altered by the provision in the statute that there may be a conviction of assault, "although an assault be not charged in terms," for the statute in substance places the concise form of indictment for murder or manslaughter on the same footing as if the death were charged by means of a personal assault. (b)

It has been held, under the Con. Stats. Can., c. 99, s. 66, that there could be no conviction for an assault, unless the indictment charged an assault in terms, or a felony necessarily implying an assault. (c)

Now, however, s. 51 seems to amend the Con. Stats., and it is apprehended that under it there may be a conviction of assault, though not charged in terms. It would seem that in the cases of murder by violence, rape, robbery, stabbing and the like, being all crimes which necessarily include an assault, a prisoner, if acquitted of the felony, can clearly be convicted of an assault, under this section, if the assault was included in and conduced to the felony ; and as the charge of either of these offences necessarily includes a charge of assault, he could be so convicted even, before the recent Act, without any charge of an assault in terms. But when we take murder and manslaughter, the bare charge of which does not show an assault, the prisoner may now be convicted of an assault under the recent Act though not charged in terms, if the evidence shews an assault committed, in attempting to commit the felony charged, or as parcel thereof.

But you cannot bring a case within this Act, by aver-

(a) *Reg. v. Ganes*, 22 U. C. C. P. 185 ; following *Reg. v. Bird*, 2 Den. C. C. 94 ; *Reg. v. Dingman*, 22 U. C. Q. B. 283.

(b) *Reg. v. Ganes*, *supra*.

(c) *Reg. v. Dingman*, *supra*.

ring an assault in the indictment which is not included in, and parcel of, the felony charged. There can be no conviction of an assault, unconnected with the felony charged. The Act only dispenses with an express allegation of an assault ; where the felony is of such a nature, that the mere charge of it is not also a charge of an assault. (a)

Shooting with intent to murder involves an assault.

(b) By the (N. B.) 12 Vic., c. 29, "whosoever shall maliciously by any means, manifesting a design to cause grievous bodily harm, attempt to cause grievous bodily harm to any other person, whether any bodily harm be caused to such person or not, shall be guilty of felony." An indictment charging the prisoner, with having maliciously assaulted J. M. and cut him with a knife, with intent to do him grievous bodily harm, concluding *contra formam statuti*, was held bad, for the means used were not set out with such particularity, as necessarily to manifest the design, which constituted the felony, and there was no allegation following the words of the Act:—*Held*, also that the conviction could not stand for an assault as the Act did not apply, where the indictment was defective, but where the evidence proved an assault under circumstances, not amounting to felony. (c)

If the indictment does not charge a felony, including an assault, the prisoner cannot be convicted of an assault under art. 17 (d)

Upon an indictment containing counts for assaulting and maliciously inflicting grievous bodily harm, and a count for a common assault, after evidence of grievous injuries inflicted by the prisoner, the Judge told the

(a) See *Reg. v. Dingman*, 22 U. C. Q. B. 283 ; *Reg. v. Bird*, 2 Den. C. C. 94.

(b) *Reg. v. Reno and Anderson*, 4 U. C. P. R. 296, per *Draper*, C. J.

(c) *Reg. v. Magee*, 2 Allen, 14.

(d) *Ib.*

jury: there was evidence to go to them of grievous bodily harm, and that the question of whether the prisoner intended to inflict grievous bodily harm did not arise. The jury found the prisoner guilty of an aggravated assault, without premeditation, under the influence of passion :— Held that the assault was intentional in the understanding of the law ; that upon the facts, the jury were justified in finding the defendant guilty of an assault with grievous bodily harm, and that the prisoner was properly convicted of that offence. (a)

An indictment charging a prisoner with shooting at A. B., with intent to do him grievous bodily harm, is well supported by evidence, shewing that he fired a loaded pistol, indiscriminately into a group, intending to do grievous bodily harm, and that he hit A. B. (b)

In construing the latter part of the 32 & 33 Vic., c. 20 s. 19, we should read the section as though the term *malicious* had been introduced. It is an essential element in a conviction, under this section, that the act which caused the unlawful wounding should have been done maliciously as well as unlawfully. (c)

The prosecutor and the prisoner were out at night, in separate punts on a creek, in pursuit of wild fool. The prisoner, who was jealous of any one going there to shoot, and had threatened to fire at birds, notwithstanding other persons might be between him and them, discharged his gun from a distance of twenty-five yards towards the punt, in which the prosecutor lay paddling. At that moment the prosecutor's punt slewed round, and the prosecutor was struck by some of the shot and seriously wounded, whereupon the prisoner rendered him help, assuring him that the injury was an accidental re-

(a) *Reg. v. Sparrow*, 8 U. C. L. J. 55; Bell, 298; 30 L. J. (M. C.) 43.

(b) *Reg. v. Fretwell*, 33 L. J. (M. C.) 128; L. & C. 443.

(c) *Reg. v. Ward*, L. R. 1 C. C. R. 356.



sult of the slewing round of the punt. The night was light, and the boat visible fifty yards off. No birds were in view. The two men had always been on good terms, and the gun was fired, apparently, with the intention of frightening the prosecutor away rather than that of hurting him. The prisoner was indicted for the felony of wounding, with intent to do grievous 'bodily harm, but was found guilty of the misdemeanor of unlawfully wounding, within the above section :—*Held*, that there was proof of malice which justified the conviction of the prisoner. (a)

The Con. Stats. Can. c. 91 s. 37, applied only to common assaults. (b)

No words of provocation whatever can amount to an assault. (c) To constitute such an assault, as will justify moderate and reasonable violence in self-defence, there must be an attempt or offer with force and violence to do a corporal hurt to another, as by striking him with or without a weapon, or presenting a gun at him, at such a distance to which the gun will carry, or pointing a pitch fork at him, standing within reach of it, or by holding up one's fist at him, or by drawing a sword, and waving it in a menacing manner. (d)

Where some thirty persons, armed and riotously assembled in front of the plaintiff's house, and apparently in the act of breaking into it, threatened to break into it, and assault, tar, feather and ride the plaintiff on a rail, it was held that though the plaintiff believed they were going to break into his house for this purpose, yet he could not justify shooting at them with a pistol, without warning them to desist and depart, but such request to depart

(a) *Reg. v. Ward*, L. R. 1 C. C. R. 356.

(b) *Re McKinnor*, 2 U. C. L. J. N. S. 328, per *A. Wilson, J.*

(c) *The Toronto N. V. A. R.* 170.

(d) *Ib.* 178-9.

would not have been necessary, perhaps, if the aggressors had been actually advancing upon the plaintiff, in the attitude of assaulting him, and still less if any of them had actually struck him. (a)

The law is properly careful to exact that people shall not on the mere apprehension of violence, which is not immediately threatened, resort to desperate means of defence and shed blood without necessity, though there may be considerable provocation and some shew of violence, and, generally speaking, it must be left to the jury to ascertain as a question of fact whether the means of resistance adopted were justified by the nature of the attack.

(b) If more force and violence be used than necessary to expel a party from a house, after he has been requested, and refused to leave, it cannot be justified, (c) Although a party may lawfully take hold of one who declines to leave his house and put him out, yet he has no right to beat him cruelly, not in order to make him go out, but to punish him for not going out. (d)

Upon an indictment for assaulting a bailiff of a county court, in the execution of his duty, the production of a county court warrant for the apprehension of the prisoner is sufficient justification of the act of the bailiff, in apprehending the prisoner, without proof of the previous proceedings authorizing the warrant. (e)

Moderate correction of a servant or scholar, by his master, is not an assault. A master has not by law a right to use force in the correction of any servant, but an apprentice; the moderate correction of a servant, who is an infant, may be justified. The beating of a servant of full age cannot be justified, and will form a sufficient

(a) *Spires v. Barrick*, 14 U. C. Q. B. 424, per *Robinson*, C. J.

(b) *Ib.* 424, per *Robinson*, C. J.

(c) See *Glass v. O'Grady*, 17 U. C. C. P. 233.

(d) *Ib.* 236, per *J. Wilson*, J.; *Davis v. Lennon*, 8 U. C. Q. B. 599.

(e) *Reg. v. Davis*, 8 U. C. L. J. 140; L. & C. 64; 30 L. J. (M. C.) 159.

cause or excuse for departure, or for discharge from service by a master, on complaint. Wounding, kicking and tearing a person's clothes do not fall within the scope of moderate correction. (a) School-masters have a right of moderate chastisement against disobedient and refractory scholars; but it is a right which can only be exercised when necessary for the maintenance of school discipline and the interests of education, and to a degree proportioned to the nature of the offence committed. Any chastisement exceeding this limit, and springing from motives of caprice, anger or bad temper, constitutes an offence punishable like ordinary delicts. (b)

On an indictment charging an aggravated assault, or an offence of a higher nature than an assault, but nevertheless including it, the prisoner may be found guilty of a common assault, for it is not necessary that matter of aggravation stated in the indictment should be proved and, if not proved, the prisoner may be found guilty of the offence without the circumstances of aggravation. (c) An indictment charged the prisoner, in the first count with "unlawfully, and maliciously wounding," and in the second count with unlawfully and maliciously inflicting grievous bodily harm, the jury having found the prisoner guilty of an assault:—*Held* that the conviction was right, as the offences charged were misdemeanors, and each of them necessarily included the lesser misdemeanor of an assault. (d) So a person, indicted for inflicting grievous bodily harm and actual bodily harm, may be convicted of a common assault. (e) A charge of assault and beating would be sustained by

(a) *Mitchell v. Defries*, 2 U. C. Q. B. 430, per *M'Lean*, J.

(b) *Brisson v. Lafontaine*, 8 L. C. J. 173.

(c) *Reg. v. Taylor*, L. R. 1 C. C. R. 194; 38 L. J. (M. C.) 106.

(d) *Ib.*

(e) *Reg. v. Oliver*, 8 U. C. L. J. 55; Bell, 287; 30 L. J. (M. C.) 12; *Reg. v. Yeadon*, L. & C. 81; 31 L. J. (M. C.) 70.

proof of an aggravated assault, as the aggravation is merely matter of evidence. (a)

This offence is a misdemeanor (b) and is so punishable. The punishment usually inflicted is fine, imprisonment and sureties to keep the peace. (c) The Court of Quarter Sessions has a general power to fine and imprison in case of assault. (d)

A charge of assaulting a bailiff in the execution of his duty, being a misdemeanor, is triable at the Sessions. (e)

An assault may, in certain cases, amount to a capital felony, when, it is apprehended, it could not be tried at the Sessions. An assault may be accompanied by violence from which death ensues, and then the offence would be either murder or manslaughter. Or an assault may be accompanied with a violation of the person of a woman against her will, in which case it would be a rape, or, though the purpose was not effected, the circumstances might be such as to leave no doubt of an assault with intent to commit a rape, therefore an assault may amount to a capital felony, or a felony, or misdemeanor, according to the circumstances with which it is accompanied. (f)

On motion to quash a conviction for an assault made by two Justices of the County of Norfolk, it was held that, stating the offence to have been committed at the defendant's place in the Township of Townsend was sufficient, for the Con. Stats. U. C, c. 3, s. 1, ss. 37, shewed that township to be within the County of Norfolk, of which county the convicting Magistrates were two of the Justices, and being a public statute, the Court would notice it judi-

(a) *Re M'Kinnon*, 2 U. C. L. J. N. S. 329, per *A. Wilson, J.*

(b) See *Reg. v. Taylor*, L. R. 1 C. C. R. 194.

(c) *Ovens v. Taylor*, 19 U. C. C. P. 52, per *Hagarty, J.*

(d) *Ib.* 49.

(e) *Reg. v. Caisse*, 8 L. C. J. 281.

(f) *M'Curdy v. Swift*, 17 U. C. C. P. 139, per *A. Wilson, J.*

ally ; also that it was unnecessary to shew on the face of the conviction that complainant prayed the Magistrates to proceed summarily, for s. 1 of the Con. Stats. Can., c 103, applied to the case, and s. 50 authorized a form of conviction which had been followed precisely, and if there was no such request, and therefore no jurisdiction, it should have been shewn by affidavit. (a) It was also held in this case that it was clearly no objection that the assault was not alleged to be unlawful. (b) But it has been held in Quebec that a conviction for assault will be quashed, if there is nothing to shew that the assault was made unlawfully. (c)

(a) *Reg. v. Shaw*, 23 U. C. Q. B. 616.

(b) *Ib*

(c) *Ex parte Holden*, 6 L. C. R. 481. See *Reg. v. M'Donald*, 4 Allen 440, as to conviction for assaulting a constable in the execution of his duty.

## CHAPTER V

## OFFENCES AGAINST PROPERTY.

*Burglary.*—Burglary has been defined to be, a breaking and entering the mansion house of another in the night, with intent to commit some felony within the same, whether such felonious intent be executed or not. (a)

Both a breaking and entering are necessary to complete the offence, and every entrance into the house, in the nature of a mere trespass, is not sufficient. Thus if a man enter into a house by a door or window which he finds open, or through a hole which was made there before, and steal goods, or draw goods out of the house through such door, window, or hole, he will not be guilty of burglary. (b) There must either be an actual breaking of some part of the house, in effecting which more or less actual force is employed, or a breaking by construction of law, where an entrance is obtained by threats, fraud, or conspiracy. (c)

An actual breaking of the house may be by making a hole in the wall ; by forcing open the door ; by putting back, picking or opening the lock with a false key ; by breaking the window ; by taking a pane of glass out of the window, either by taking out the nails or other fastening, or by drawing or bending them back, or by put-

(a) 2 Russ. Cr. 1.

(b) *Ib.* 2.

(c) *Ib.* 2.

ting back the leaf of a window with an instrument, **and** even the drawing or lifting of a latch. (a)

Where the door is not otherwise fastened, the **turning** of the key where the door is locked on the inside, or **the** unloosing any other fastening which the owner has **provid-**ed will amount to a breaking. (b)

If a man enters by a door or window which he **finds** open, or through a hole which was made there before, **it** is not burglary. (c)

Where an entry was effected by taking out the **glass** from a door it was holden to be burglary, (d) and where the defendant pulled down the sash of a window which had no fastening, and was only kept in its place by the pulley-weight, it was holden to be burglary, although there was an outer shutter which was not put to. (e) So where he raised a sash window which was shut down close but not fastened, though it had a hasp which might have been fastened. (f) And where a window opening upon hinges and fastened with wedges, but so that, by pushing against it, it could be opened, was opened, it was holden to be burglary. (g) So where a party thrust his arm through the broken pane of a window, and in doing so broke some more of the pane, and thus got at and removed the fastening of the window and opened it, it was holden to be a sufficient breaking. (h) Lifting up the flap of a cellar usually kept down by its own weight is a sufficient breaking for the purpose of burglary. (i) If a window be partly open, but not sufficiently to admit a

(a) 2 Russ. Cr. 2-3; *Rex. v. Owen*, 1 *Lewin*, 35 per *Bayley, J.*; *Rex v. Lawrence*, 4 C. & P. 231; *Rex v. Jordan*, 7 C. & P. 432.

(b) 2 Russ. Cr. 3.

(c) *Ib.* 2; and see *Rex. v. Lewis*, 2 C. & P. 628; *R. v. Spriggs*, 1 M. & Rob. 357.

(d) *R. v. Smith*, R. & R. 417.

(e) *R. v. Haines*, R. & R. 451.

(f) *R. v. Hyams*, 7 C. & P. 441.

(g) *R. v. Hall*, R. & R. 335.

(h) *R. v. Robinson*, 1 Mood. C. C. 377.

*R. v. Russell*, 1 Mood. C. C. 377.

person, the raising of it so as to admit a person is not a breaking of the house. (a)

It is burglary if a man obtain entrance to a house by means of the chimney, for though open it is as much closed as the nature of the structure will admit. (b) But an entry through a hole in the roof is not burglary, for a chimney is a necessary opening and requires protection; whereas if a man choose to have a hole in the wall or roof of his house, instead of a fastened window, he must take the consequences. (c)

As to a breaking by fraud, where an act is done in *fraudem legis* the law gives no benefit to the party, so that if thieves obtain entrance, under pretence of business, as to arrest a suspected person or the like, if the other ingredients are also in the offence, it will amount to burglary. (d)

It is also burglary if the entrance is obtained by conspiracy, as if A., the servant of B., conspire with C. to let him in to rob B., and accordingly A. in the night time opens the door and lets him in, it is burglary in both. (e)

But if a servant, pretending to agree with a robber, open the door and let him in for the purpose of detecting and apprehending him, this is no burglary for the door is lawfully open. (f)

There may also be a breaking in law where, in consequence of violence commenced or threatened, the owner, either from apprehension of the violence, or with a view to repel it, opens the door through which the thief enters. (g) With respect to the entry, any, even the least entry, either with the whole or any part of the body,

(a) *R. v. Smith*, 1 Mood. C. C. 178; Arch. Cr. Pldg. 497.

(b) 2 Russ. Cr. 4; *Rex v. Brice*, R. & R. 450.

(c) *Rex v. Spriggs*, 1 M. & Rob. 357.

(d) 2 Russ. Cr. 9.

(e) *Ib.* 10.

(f) *Rex v. Johnson*, C. & Mar. 218.

(g) 2 Russ. Cr. 8.



hand or foot, or with any instrument or weapon introduced for the purpose of committing a felony, will be sufficient. (a)

The 32 & 33 Vic., c. 21, s. 53, renders it a felony to *enter* any dwelling-house in the night, with intent to commit any felony therein, and thus dispenses with proof of a breaking under this clause. S. 50 provides that whosoever enters the dwelling-house of another, with intent to commit any felony therein, or being in such dwelling-house commits any felony therein, and, in either case, breaks out of the said dwelling-house in the night, is guilty of burglary.

Every house for the dwelling and habitation of man is taken to be a dwelling-house in which burglary may be committed; (b) and this dwelling-house formerly included the out-houses, such as ware-houses, barns, stables, cow-houses, or dairy-houses, though not under the same roof or joining contiguous to the dwelling-house, provided they were parcel thereof. But now the 32 & 33 Vic., c. 21, s. 52, enacts that such houses shall not be considered part of the dwelling-house for the purpose of burglary, unless there be a communication between such building and dwelling-house, either immediate or by means of a covered and enclosed passage leading from one to the other. (c)

Unless the owner has taken possession of the house, by inhabiting it personally or by some one of his family, it will not have become his dwelling-house as applied to the offence of burglary. (d) But the occasional or temporary absence of the owner will not prevent it from being his dwelling-house. (e) How-

(a) 2 Russ. Cr. 11.; See *R. v. Davis*, R. & R. 499; *R. v. Bailey*, R. & R. 341.

(b) 2 Russ. Cr. 15.

(c) See *Reg. v. Burrowes*, 1 Mood. C. C. 274; *Reg. v. Higgs*, 2 C. & K. 322; *Reg. v. Jenkins*, R. & R. 224.

(d) 2 Russ. Cr. 21.

(e) 2 Russ. Cr. 23.

ever, in these cases there must be an intention, on the part of the owner, to return to his house, *animus revertendi*. (a)

As to the time of committing the offence, it is settled that in the daytime there can be no burglary. (b) If a house is entered in the daytime it is house-breaking and not burglary. By the 32 & 33 Vic., c. 21, s. 1, it is enacted that so far as regards the offence of burglary the night shall be considered to commence at 9 o'clock in the evening of each day, and end at six o'clock in the morning of the next succeeding day.

The breaking and entering need not be both in the same night, provided the breaking be with intent to enter, and the entry with intent to commit a felony. (c) But the breaking and entry must both be committed in the night time. If the breaking be in the day and the entering in the night, or the breaking in the night and the entering in the day, it is no burglary. (d)

As to the *intent*, the offence must be with intent to commit some felony within the house, whether such felonious intent be executed or not, (e) and when the breaking is a breaking out of the dwelling-house in the night there must have been a previous entry with intent to commit a felony, or an actual committing of a felony in such dwelling-house.

If the entry were only for the purpose of committing a trespass, the offence will not be burglary. But if a felony be committed, the act will be *prima facie* pregnant evidence of an intent to commit it. (f) And it is a general rule that a man who commits one sort of felony, in

(a) 2 Russ. Cr. 23; 4 Bla. Com. 225.

(b) 4 Bla. Com. 224.

(c) *R. v. Smith*, R. & R. 417. See *R. v. Jordan*, 7 C. & P. 432; Arch Cr. Pldg. 490.

(d) *Ib.*

(e) *Ante* p. 281.

(f) See *R. v. Locost*, Kel. 30.

attempting to commit another, cannot excuse himself on the ground that he did not intend the commission of that particular offence. (a) But it makes no difference whether the offence intended were felony at common law, or only created so by statute, on the ground that, when a statute makes an offence felony, it incidentally gives it all the properties of felony at common law. (b)

The offence of house-breaking is very nearly allied to that of burglary, the principal distinctions between them being that the latter is committed by night, the former by day; and by the express language of the statute, the breaking and entering, in case of the former, must be accompanied with some larceny, and an intent to commit a felony is not sufficient.

A man cannot be indicted for a burglary in his own house. Therefore, if the owner of a house break and enter the room of his lodger, and steal his goods, he can only be convicted of larceny. (c)

The 32 & 33 Vic., c. 21, s. 54, makes it felony to break and enter any building, and commit any felony therein, such building being within the curtilage of a dwelling-house, and occupied therewith, though such building is not part thereof, according to the law of burglary. It is also felony for any one, being in any such building, to commit any felony therein, and break out of the same. S. 56 makes it felony to break and enter any dwelling-house, church, chapel, meeting-house, or other place of divine worship, or any building within the curtilage, school-house, shop, warehouse, or counting-house, with intent to commit any felony therein; and s. 57 provides that whosoever is indicted for any burglary, where the breaking and entering are proved at the trial to have been

(a) 2 Russ. Cr. 41.

(b) *Ib.* 43.

(c) Arch. Cr. Pldg. 496.

made in the day time, and no breaking out appears to have been made in the night time, or where it is left doubtful whether such breaking and entering, or breaking out, took place in the day or night time, shall be acquitted of the burglary, but may be convicted of the offence specified in the next preceding section. By s. 58, it shall not be available, by way of defence, for a person charged with the offence specified in the next preceding section but one, to shew that the breaking and entering were such as to amount in law to burglary, provided that the offender shall not be afterwards prosecuted for burglary upon the same facts; but it shall be open to the Court, before whom the trial for such offence takes place, upon the application of the person conducting the prosecution, to allow an acquittal, on the ground that the offence, as proved, amounts to burglary; and if an acquittal takes place on such ground, and is so returned by the jury in delivering their verdict, the same shall be recorded, together with the verdict, and such acquittal shall not then avail as a bar or defence upon an indictment for such burglary.

*Robbery.*—This offence consists in the felonious taking of money or goods, of any value, from the person of another, or in his presence, against his will, by violence, or putting him in fear of purpose to steal the same. (a)

Robbery is, in effect, larceny, aggravated by circumstances of force, violence, or putting in fear; and a party indicted for robbery may be convicted of larceny, as the latter crime is included in the former. (b) Force is a necessary ingredient in robbery, but not in larceny. (c)

Merely snatching property from a person unawares, and running away with it, will not be robbery, (d) be-

(a) *Re. B. G. Burley*, 1 U. C. L. J. N. S. 50, per *J. Wilson*, J.

(b) *Reg. v. M'Grath*, L. R. 1 C. C. R., 210-11, per *Blackburn*, J.

(c) *Ib.*

(d) *R. v. Baker*, 1 Leach, 290; *R. v. Wall's*, 2 C. & K. 214.

cause fear cannot, in fact, be presumed in such a case. The rule appears to be well established that no sudden taking or snatching of property unawares from a person is sufficient to constitute robbery, unless some injury be done to the person, or there be a previous struggle for the possession of the property, or some force used to obtain it. (a)

The fear must precede the taking, for if a man privately steal money from the person of another, and afterwards keep it, by putting him in fear, this is no robbery, for the fear is subsequent to the taking. (b)

The goods must be of some value to the party robbed ; and therefore, where the defendant compelled the prosecutor, by threats, to sign a promissory note for a sum of money, it was holden by the Judges not to be robbery, because the note was of no value to the prosecutor. (c) Under such circumstances, however, the defendant might now be indicted for the felony described in the 32 & 33 Vic., c. 21, s. 47.

The goods must be taken either from the person of the prosecutor, or in his presence, (d) and against his will. If the party robbed consent to the robbery, the offence will not be made out ; but it is sufficient to prove that the goods were either taken from him by force and violence, or delivered up by him to the defendant, under the impression of that degree of fear and apprehension which is necessary to constitute robbery. (e)

The goods must appear to have been taken *animo furandi*, as in other cases of larceny ; and if a person, under a *bona fide* impression that the property is his own, obtain it by menace, that is a trespass, but not robbery. (f)

(a) Arch. Cr. Pldg. 413-14.

(b) *Ib.* 416.

(c) *Ib.* 416 ; *Reg. v. Smith*, 2 Den. 449 ; 21 L. J. (M. C.) 111.

(d) See *R. v. Francis*, 2 Str. 1015 ; *R. v. Hamilton*, 8 C. & P. 49.

(e) Arch. Cr. Pldg. 416-17.

(f) *Ib.* ; *R. v. Hall*, 3 C. & P. 409.

An actual taking, either by force, or upon delivery, is necessary—that is, it must appear that the robber actually got possession of the goods. The goods must also be carried away, as in other cases of larceny; but if the property be once taken, the offence will not be purged by the robbers delivering it back to the owner. (a)

Upon an indictment for robbery, or for an assault with intent to rob, in different counts, it has been held that the prosecutor ought to elect upon which count he would proceed. (b) But now, on the trial of an indictment for robbery, the jury may convict of an assault with intent to rob, (c) so that the necessity of several counts in such case is done away with. (d)

Where the prosecutor was compelled, by duress, to sign a promissory note, which had been previously prepared by the defendant, who produced it, and withdrew it again as soon as it was signed, the Judges inclined to the opinion this was not larceny, because the instrument was of no value to the prosecutor, who had not even a property in, or possession of, the paper on which it was written. (e) Such cases as the above are now provided for by the 32 & 33 Vic., c. 21, s. 47.

The proviso in s. 17 of this Statute was intended to meet a difficulty which arose in *Reg. v. Skeen*. (f)

*Larceny*.—Theft is the wrongfully obtaining possession of any movable thing which is the property of some other person, and of some value, with the fraudulent intent entirely to deprive him of such thing, and have or deal with it as the property of some person other than

(a) Arch. Cr. Pldg. 417.

(b) *Reg. v. Gough*, 1 M. & Rob. 71.

(c) 32 & 33 Vic. c. 21 s. 40.

(d) Arch. Cr. Pldg. 70.

(e) *R. v. Phipoe*, 2 Leach, 673; *R. v. Edwards*, 6 C. & P. 515; *R. v. Smith*, 2 Den. 449; 21 L. J. (M. C.) 111; Arch. Cr. Pldg. 372.

(f) Bell 97; 28 L. J. (M. C.) 91.

the owner. (a) Larceny has been also defined as the wrongful or fraudulent taking, and carrying away, by any person, of the mere personal goods of another, with a felonious intent to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner. (b)

The goods taken must, in the absence of any express statutable enactment, be *personal* goods, for none other can be the subject of larceny at common law. (c) Bonds, bills, etc., being mere *choses in action*, are not the subject of larceny at common law, for they are of no intrinsic value. (d)

The 32 & 33 Vic., c. 21, s. 15, *et seq.* now alters the law in this respect. Section 16 contains provisions as to the form of the indictment under it. By s. 18, it is not necessary to allege that the article, in respect to which the offence is committed, is the property of any person.

A party cannot commit larceny of a bond made by another person to himself, and, especially, he could not be guilty of larceny in stealing a bond from the obligor, because a bond in the hands of the obligor could be of no value to him, as a bond, under any possible circumstances; and when the 2 Geo. 2, c. 25, was in force, no other than a bond for the payment of money could be the subject of larceny. (e)

Certificates treated and dealt with on the London Stock Exchange, as scrip of a foreign railway, are "valuable security" within the 7 & 8 Geo. 4, c. 29, s. 5, and the subject of larceny. (f)

On an indictment for stealing a *piece of paper*, the de-

(a) Cr. Law Comra. 3rd Rep.

(b) *Reg. v. M'Grath*, L. R. 1 C. C. R., 209, per *Kelly*, C. B.; 39 L. J. (M. C.) 7.

(c) Arch. Cr. Pldg. 316.

(d) *Ib.* 317.

(e) *Caverley v. Caverley*, 3 U. C. Q. B. O. S. 341, per *Robinson*, C. J.

(f) *Reg. v. Smith*, 2 U. C. L. J. 59; *Deara*, C. C. 561.

fendant could not be convicted of stealing an agreement, though unstamped, for building certain cottages, the work under which agreement was actually in progress. (a)

Larceny cannot be committed of things which are not the subject of property. (b) But partridges hatched and reared by a common hen, while they remain with her, and from their inability to escape, are practically under the dominion and in the power of the owner of the hen, may be the subject of larceny, though the hen is not confined in a coop, or otherwise, but allowed to wander with her brood about the premises of her owner. (c)

Dogs not being the subject of larceny at common law, are not chattels within 7 & 8 Geo. 4, c. 29, s. 58. (d)

There is no absolute property in animals *feræ naturæ*, but only a special or qualified right of property—a right *rationi soli* to take and kill them; and when killed upon the soil, they become the absolute property of the owner of the soil.

When the thing is not, in its original state, the subject of larceny, it is necessary that the act of taking should not be one continuous act with the act of severance, or other act, by which the thing becomes the subject of larceny. (e)

Where poachers, of whom the prisoner was one, wrongfully killed a number of rabbits upon land belonging to the Crown, and placed the rabbits in a ditch upon the same land, some of the rabbits in bags and some strapped together; they had no intention to abandon the wrongful possession of the rabbits which they had acquired by

(a) *Reg. v. Watts*, Deara. 326; 23 L. J. (M. C.) 56. See now 32 & 33 Vic. c. 21, s. 15.

(b) Arch. Cr. Pldg. 318.

(c) *Reg. v. Shickle*, L. R. 1 C. C. R. 158; 38 L. J. (M. C.) 21; *Reg. v. Cory*, 10 Cox. 23 followed.

(d) *Reg. v. Robinson*, 5 U. C. L. J. 143; Bell, 34; 28 L. J. (M. C.) 58.

(e) *Reg. v. Townley*, L. R. 1 C. C. R. 317, per Bovill, C. J.



taking them, but placed them in the ditch as a place of deposit till they could conveniently remove them ; about three hours afterwards the prisoners came back and began to remove the rabbits :—*Held*, that the taking of the rabbits and the removal of them was one continuous act, and that the removal was therefore not larceny. (a) But if the goods vest in the owner, in the interval between the severance and the removal, it is larceny. (b) Potatoes severed from the soil, or dug and in pits, are clearly the subject of larceny. (c)

The distinction between grand and petty larceny has been abolished, and now all larcenies, whatever be the value of the property stolen, shall be deemed to be of the same nature, and shall be subject to the same incidents in all respects as grand larceny was before the distinction between grand and petty larceny was abolished. (d)

There must be an actual or constructive *taking* of the goods, on the ground that larceny includes a trespass. (e) There must also be a *carrying away* ; but, as the felony lies in the very first act of removing the property, the least removing of the thing taken from the place where it was before, with intent to steal it, is a sufficient asportation. (f)

To constitute larceny, there must be an *animus furandi* : i. e. a felonious intent to take the property of another against his will. The essence of the offence is knowingly taking the goods of another against his will. (g) If the goods were taken with the consent of the owner then the property would pass, and according to a distinction

(a) *Reg. v. Townley*, L. R. 1 C. C. R. 315.

(b) *Ib.* 318, per *Bramwell*, B.

(c) *Hunter v. Hunter*, 25 U. C. Q. B. 146, per *Hagarty*, J.

(d) 32 & 33 Vic. c. 21, s. 2.

(e) 2 Russ. Cr. 152.

(f) *Ib.* See also *Reg. v. Townley*, L. R. 1 C. C. R. 319, per *Blackburn*, J.

(g) *Reg. v. M'Grath*, L. R. 1 C. C. R., 210-11, per *Blackburn*, J. ; see *Reg. v. Prince*, L. R. 1 C. C. R. 150 ; 38 L. J. (M. C.) 8.

to be afterwards pointed out, it would not be larceny ; and if not taken feloniously the taking would amount only to a bare trespass.

It is clear that the taking must be *animo furandi* and *lucris causâ*. Thus where the prisoner's goods were seized under warrants of execution of a County Court, and were in possession of a bailiff, and the prisoner, with intent to deprive the bailiff, as he supposed, of his authority, and so defeat the execution, forcibly took the warrants from him, without any intent otherwise to make use of them, it was held that the prisoner was not guilty of larceny. (a) But in such case the prisoner would be guilty of taking the warrants for a fraudulent purpose, within the meaning of the 32 & 33 Vic., c. 21, s. 18, by which the stealing of any records is made felony. (b)

Returning the goods may be evidence to negative the *animus furandi* at the time of taking them, but it is no defence that the prisoner intended to return them when taken. (c) Where the prisoner, having broken open a plate chest, of which he was bailee for safe custody, and pawned the contents, was tried for the simple larceny, the jury found him guilty, but recommended him to mercy, "believing that he intended ultimately to return the property" :—*Held*, that the conviction must be sustained, for upon the facts there was evidence of larceny, and it did not appear from the recommendation to mercy that the jury believed that the prisoner, at the precise time when he took the property, intended to return it. (d)

As to larceny of lost property, the general rule seems to be that if a man find goods that have been actually

(a) *Reg. v. Bailey*, L. R. 1 C. C. R. 347.

(b) *Ib.*

(c) See *Reg. v. Cummings*, 4 U. C. L. J. 189, per *Spragge*, V. C.; *Reg. v. Trebilcock*, 4 U. C. L. J. 168; *Dears. & B.* 453; 27 L. J. (M. C.) 103.

(d) *Reg. v. Trebilcock*, *supra*.

lost, or are reasonably supposed by him to have been lost, and appropriates them, with intent to take the entire dominion over them, really believing, when he takes them, that the owner cannot be found, it is not larceny : but if he takes them with the like intent, though lost or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny. (a) It is necessary that the prisoner, at the time of finding, should believe that the owner can be ascertained, and without this, an intention to appropriate, at the time of the finding, will not make the prisoner guilty of larceny, though he ascertain the name of the owner before converting to his own use.

The prisoner found a sovereign in the highway, believing at the time that it had been accidentally lost, but nevertheless with a knowledge that he was doing wrong, he at once determined to appropriate it, though it should afterwards become known to him who the owner was. There was no evidence to shew that the prisoner believed he could ascertain who the true owner was, at the time he found the sovereign :—*Held*, that the prisoner was not guilty of larceny. (b)

In all cases of larceny of lost property the question turns on what were the prisoner's grounds for believing that the goods were abandoned. (c) But there is a distinction between property which is *lost* or abandoned, and that which is only *mislaid*. If property is *abandoned*, any one may acquire a right against the owner, (d) and, acquiring the property by a lawful title in the first instance, he cannot be guilty of larceny. As above explained, a person may, in certain cases, acquire a lawful

(a) *Reg. v. Thurborn*, 1 Den. 388; 2 C. & K. 831; 18 L. J. (M. C.) 140; affirmed in *Reg. v. Glyde*, L. R. 1 C. C. R. 139; 37 L. J. (M. C.) 107.

(b) *Reg. v. Glyde*, *supra*.

(c) *Ib.* 144, per Cockburn, C. J.

(d) See *Reg. v. Glyde*, *supra*.

title to *lost* property, and cannot, therefore, be found guilty of larceny. But if property is only mislaid or left in some place of deposit or security, a person fraudulently appropriating it is guilty of larceny,

A purchaser at the prisoner's stall left his purse in it. A stranger pointed out the purse to the prisoner, supposing it to be hers, and reproved her for carelessness, when she put it in her pocket, and afterwards concealed it, and on the return of the owner denied all knowledge of it. Upon the indictment for larceny, the jury found that the prisoner took up the purse, knowing it was not her own, and intending at that time to appropriate it to her own use, but that when she took it she did not know who was the owner. Whereupon she was convicted:—*Held*, that the conviction was proper, and that the purse so left was not *lost* property. (a)

But the prisoner must, at the time of finding, have the means of ascertaining who the owner is, or reasonably believe that he can be found, and must also have the intention of appropriating the property to his own use.

Upon an indictment for stealing a note, it was found by the jury that the note was lost by the prosecutor and found by the prisoner. There was no evidence that the note had any name or other mark upon it indicating to whom it belonged, nor was there evidence of any other circumstances which would disclose to the prisoner, at the time when he found it, the means of discovering the owner:—*Held*, that he could not be convicted of larceny, although the jury, being asked whether, at or after the time of finding, he believed that there was not a reasonable probability that the owner could be found, had answered that he did believe the owner could be traced. (b)

(a) *Reg. v. West*, 1 U. C. L. J. 17; *Dears.* 402; 24 L. J. (M. C.) 4.

(b) *Reg. v. Dixon*, 2 U. C. L. J. 19; *Dears.* 580; 25 L. J. (M. C.) 39.

In order to convict the finder of lost property of larceny, it is essential that there should be evidence of a felonious intention to appropriate the property at the time of finding; and evidence of a subsequent intention is insufficient.

Upon the trial of the finder of a purse for larceny, the jury were directed that a felonious intent was necessary in every larceny; but that it might be inferred, from subsequent as well as immediate acts, and that, if they were satisfied that the prisoner heard the landlady of a public-house, where he subsequently went, speaking of the loss, and then did not take measures to make restitution, they might infer a felonious intention:—*Held* that the direction was wrong, as it was calculated to mislead the jury to suppose that a felonious intent, subsequent to the finding, was sufficient. (a)

In this case, it was submitted that the nature of the property was such that the finder could not do otherwise than believe that the owner might be found, and that, having converted it to his own use, under these circumstances, it might be inferred that it was his intention to do so at the time of finding. The inference was disallowed by *Pollock*, C. B., on considering all the comitants of the case.

A post letter, directed to J. D., containing a Post-Office order, was misdelivered to J. D., one of the prisoners. He took it to W. D., the other prisoner, who read it to him. Upon hearing it read, he said the letter and order were not for him. W. D. advised him, notwithstanding, to keep the letter, and get the money. Both prisoners accordingly applied at the Post-Office, and obtained the money:—*Held* that a conviction of the prisoners for stealing the order must be set aside. (b) From this case

(a) *Reg. v. Christopher*, 5 U. C. L. J. 143; Bell, 27; 28 L. J. (M. C.) 35.

(b) *Reg. v. Davies*, 2 U. C. L. J. 137; Dears. 640; 25 L. J. M. C. 91.

it would seem that the law of larceny, in respect of articles found and appropriated by the finder, after he has ascertained what the article is, and the marks of ownership, is inapplicable to a misdelivered post letter.

Now, by the 32 & 33 Vic., c. 21, s. 72, in case of larceny by persons employed in the public service, the property may be laid in Her Majesty, or in the municipality, as the case may be.

It has been already stated that every larceny involves a trespass, and that the taking must be *animo furandi* and *invito domini*. If the possession of the goods is lawfully obtained, there can be no larceny, nor can there be any larceny if the property in the goods is divested. The property in goods can only pass by a contract, which requires the *assent* of two minds; but it is of the essence of the offence of larceny that the property be obtained against the will of the owner. If, therefore, the owner *intends* to part with the property, by virtue of which intention the property would pass, there can be no larceny, however fraudulent the means by which the property is obtained. But if there was a sufficient false pretence, the party might be guilty of obtaining the goods by false pretences.

Where the possession is lawfully obtained, a conversion, while it continues, ordinarily amounts to the cognate offence of embezzlement.

This rule may be laid down, that when the prosecutor does not intend to part with the right of property in the goods or money taken by the defendant, and, in some cases, does not intend to part with the possession of them until they are paid for, and the defendant fraudulently gets possession of them, contrary to the intention of the owner, intending all the time not to pay for them, then the jury may find the party guilty of larceny. But where

the owner voluntarily parts with the possession and property in the goods, and intends to vest them in the defendant, because he relies upon the defendant's promise to pay the money, or bring other property or money in place of those vested in him, then the prisoner cannot be convicted of larceny. (a) The above points may be fully established by reference to decided cases.

Where a servant is entrusted with his master's property, with a general or absolute authority to act for his master in his business, and is induced, by fraud, to part with his master's property, the person who is guilty of the fraud, and so obtains the property, is guilty of obtaining it by false pretences, and not of larceny, because, to constitute larceny, there must be a taking against the will of the owner, or of the owner's servant, duly authorized to act generally for the owner. But where a servant has no such general or absolute authority from his master, but is merely entrusted with the possession of his goods for a special or limited purpose, and is tricked out of that possession by fraud, the person who is guilty of the fraud, and so obtains the property, is guilty of larceny, because the servant has no authority to part with the property in the goods, except to fulfil the special purpose for which they were entrusted to him. (b) If the owner *intended* the property to pass, though he would not so have intended had he known the real facts, that is sufficient to prevent the obtaining another's property from amounting to larceny.

Where a servant has an authority co-equal with his master, and sufficient to enable him to pass his master's property, and he parts with it accordingly, such property cannot be said to be stolen, inasmuch as the servant in-

(a) *Reg. v. Bertles*, 13 U. C. C. P. 610, per *Richards*, C. J.

(b) *Reg. v. Prince*, L. R. 1 C. C. R. 150; 38 L. J. (M. C.) 8.

*tends to part with the property.* (a) In such case, it cannot be said to be parted with against the will of the owner. (b)

The cashier of a bank is a servant having a general authority to conduct the business of the bank, and to part with its property, on the presentation of a genuine order from a customer; and if he is deceived by a forged order, and parts with the money of the bank, he parts intending to do so with the *property* in the money; and the person knowingly presenting such forged order is guilty of obtaining the money by false pretences, and not of larceny. (c)

The 32 & 33 Vic., c. 21, s. 98, has amended the law on this point. The subtle distinction between these offences, which this Act intended to remedy, was, that if a person, by fraud, induced another to part with the possession only of goods, and converted them to his own use, this was larceny; while, if he induced another, by fraud, to part with the property in the goods, as well as the possession, this was not larceny. (d)

The prisoner, with another man, went into the shop of the prosecutrix, and asked for a pennyworth of sweetmeats, for which he put down a florin. The prosecutrix put it into the money drawer, and put down sixpence in silver, and fivepence in copper, in change, which the prisoner took up. The other man said, "You need not have changed," and threw down a penny, which the prisoner took up, and the latter then put down a sixpence in silver, and sixpence in copper, on the counter, saying, "Here, mistress, give me a shilling for this." The prosecutrix took a shilling out of the money drawer, and

(a) *Reg. v. Prince*, L. R. 1 C. C. R. 155, per *Blackburn*, J.

(b) *Ib.* 154, per *Bovill*, C. J.

(c) *Reg. v. Prince*, *supra*.

(d) *Reg. v. Kilham*, L. R. 1 C. C. R. 263, per *Bovill*, C. J.



put it on the counter, when the prisoner said to her, "You may as well give me the two-shilling piece, and take it all." The prosecutrix took from the money drawer the florin she had received from the prisoner, and put that on the counter, expecting she was to receive two shillings of the prisoner's money in exchange for it. The prisoner took up the florin, and the prosecutrix took up the silver sixpence, and the sixpence in copper, put down by the prisoner, and also the shilling put down by herself, and was putting them into the money drawer, when she said she had only got one shilling's worth of the prisoner's money; but at that moment the prisoner's companion drew away her attention, and, before she could speak, the prisoner pushed his companion by the shoulder, and both went out of the shop:—*Held* that the transaction was not complete, and that the property in the florin had not passed to or revested in the prisoner, and, on that ground, he was rightly convicted of larceny. (a)

A. acted as auctioneer at a mock auction. He knocked down some cloth for 26s. to B., who had not bid for it, as A. knew. B. refused to take the cloth, or to pay for it, and A. refused to allow her to leave the room unless she paid. Ultimately, she paid the 26s. to A., and took the cloth. She paid the 26s. because she was afraid. A. was indicted for, and convicted of feloniously stealing these 26s.:—*Held* that the conviction was right, because, if the force used to B. made the taking a robbery, all the elements of larceny were included in that crime. If the force was not sufficient to constitute a robbery, the taking of the money, nevertheless, amounted to larceny, as B. paid the money to A. against her will, and because she was afraid:—*Held*, further, that, under the circumstances,

(a) *Reg. v. M'Kale*, L. R. 1 C. C. R. 125; 37 L. J. (M. C.) 97.

it was not necessary that the jury should be asked whether B. paid the money against her will, as, from the evidence stated in the case, it was clear that there could have been no doubt in the minds of the jury that the money was so paid. (a)

A. & B., by false representations, induced C. to become the purchaser of a dress for 25s. They then took one guinea out of her hand, she being taken by surprise, and neither consenting nor resisting, and left with her a dress of considerably inferior value, but refused to give her one, which they had promised to give, if she would buy that. Upon a case reserved, the question put was, whether the facts warranted a verdict of guilty of larceny:—*Held*, that they did, the Court being bound to assume that it was part of the fraud to obtain the property by a false sale; and, if so, there was no contract, but a fraud, whereby the felony was committed. (b)

A quantity of wheat, not the property of the prosecutors, having been consigned to their care, was deposited in one of their storehouses, under the care of a servant, E, who had authority to deliver only to the orders of the prosecutors, or C., their managing clerk. The prisoner, a servant of the prosecutors, at another storehouse, by representation to E. that he had been sent by C. for some of the wheat and was to take it to the Brighton Railway, which representation was entirely false, obtained the key from E., and was allowed to remove five quarters, which he subsequently disposed of for his own use, the prisoner assisting to put the five quarters into the cart, in which it was conveyed away, and going with it:—*Held*, upon the facts above, that the prisoner was guilty of larceny; for the wheat was delivered to the prisoner

(a) *Reg. v. M'Grath*, L. R. 1 C. C. R. 205; 39 L. J. (M. C.) 7.

(b) *Reg. v. Morgan*, 1 U. C. L. J. 37; Dears, 395.

for a special purpose, namely, to be taken to the Brighton Railway, and the property remained in the prosecutors throughout, as bailees. (a)

It is essential to larceny that there be the intention to divest the owner's *property* by wrong; where, therefore, the servants of a glovemaker broke open a storeroom on their master's premises, and removed to another room, in the same premises, a quantity of finished gloves, with the intent of fraudulently obtaining payment for them, as for so many gloves finished by themselves:—*Held*, that they were not guilty of larceny. (b)

Where a man, having the *animus furandi* obtains, in pursuance thereof, possession of the goods by some trick or artifice, the owner not intending to part with his entire right of property, but with the temporary possession only, this is considered such a taking as to constitute larceny. (c)

It was the course of business at a colliery, where coal was sold by retail, to take the carts, when loaded, to a weighing machine in the colliery yard, where they were weighed, and the price of the coal paid. The prisoner having gone to the colliery with a fraudulent intent, a servant of the prosecutor, upon the prisoner saying he wanted a load of the best soft coal, loaded prisoner's cart with soft coal, and went away, leaving him to take it to be weighed and pay for it. The prisoner, then fraudulently covered over the soft coal with slack, an inferior coal, and by this trick, and by saying that the coal in the cart was slack, induced the weighing clerk, who did not know that the cart contained the soft coal, to weigh it as slack, and charge the prisoner accordingly:—*Held*, that the prisoner had obtained possession of the soft coal by a

(a) *Reg. v. Robins*, 1 U. C. L. J. 17; Dears. C. C. 418.

(b) *Reg. v. Poole*, 4 U. C. L. J. 73; 27 L. J. (M. C.) 53; Dears. & B. 345.

(c) Arch. Cr. Pldg. 333.

trick and that he was properly convicted of larceny. (a)

A policeman, late at night, met the prosecutor, who had just parted from a prostitute, and told him that he must go with him (the policeman) to gaol, for he was under a penalty of £1. for talking to a prostitute in the street; but if he would give him 5 shillings, he might go about his business. The prosecutor gave him 4s. 6d., but, while he was searching for the other 6d., the inspector came. It was held to be no answer to the charge, that all the money had not been obtained. The offence was a larceny, and was also a menace within the meaning of the Act. (b)

A porter was employed by the vendor of goods to deliver them to the vendee, but had no authority to receive the money for them. The vendee, however, voluntarily, and without solicitation, paid the porter for the goods. The porter came back to the vendee, and pointed out that he had been paid short, and received the balance. He subsequently converted the money to his own use:—*Held*, (Lefroy, C. J., *dissentiente*) that a conviction for larceny was not sustainable. (c)

The ground of the decision, in this case, would seem to be that the porter obtained possession of the money lawfully.

Bailment has been defined to be the giving of any property to any person, for any purpose whatever. (d)

In the case of bailment or contract of hiring, it must have been made to appear that the *animus furandi* existed at the time of receiving the chattel, and was not induced by anything that happened afterwards. (e) But if the

(a) *Reg. v. Bramley*, 7 U. C. L. J. 331; L. & C. 21.

(b) *Reg. v. Robertson*, 11 L. T. Rep. N. S. 387; L. & C. 463; 34 L. J. (M. C.)

33. See also *Reg. v. Ewing*, 21 U. C. Q. B. 523, as to what constitutes larceny.

(c) *Reg. v. Wheeler*, 14 W. R. 848.

(d) *Reg. v. Lebauf*, 9 L. C. J. 247, per *Drummond*, J.

(e) *Pease v. M'Aloon*, 1 Kerr. 116, per *Parker*, J.

circumstances indicated an intention, at the time of obtaining the chattel fraudulently, to convert it to the party's own use, it would have been larceny. (a)

It is conceived that by, the 32 & 33 Vic., c. 21, s. 3, the law in this respect is altered, and that a felonious intent, at the time of obtaining, is not now necessary, for the statute renders a conversion by a *bailee* larceny; and a bailee acquires lawful possession in the first instance, and the possession would not be lawful if the original intention were felonious.

Even before this statute, although the goods had, in the first instance, been obtained without a *felonious* intent, yet if the possession of them was obtained by a *trespass*, the subsequent fraudulent appropriation of them, during the continuance of the same transaction, was a larceny. (b)

A man cannot, however, be convicted of larceny as a bailee, unless the bailment was to re-deliver the very same chattel or money. (c)

The prisoner, a carrier, was employed, by the prosecutor, to deliver in his (the prisoner's) cart a boat's cargo of coals to persons named in the list, to whom only he was authorised to deliver them. Having fraudulently sold some of the coals, and appropriated the proceeds:—*Held*, that he was properly convicted of larceny as a bailee, within 24 & 25 Vic., c. 96, s. 3. (d)

Defendant hired a pair of horses from a livery stable, to go to a particular place, and afterwards absconded with them. The jury found that at the first he did not intend to steal, but, having accomplished the object of hiring, he then made up his mind to convert them to his own use:—*Held*, that he was a bailee within Con. Stats.

(a) *Pease v. M'Aloon*, 1 Kerr 114, per *Chipman*, C. J.

(b) See *Reg. v. Riley*, *Dears*, 149; 22 L. J. (M. C.) 48.; *Arch. Cr. Pldg.* 340.

(c) *R. v. Hoare*, 1 F. & F. 647; *R. v. Garrett*, 2 F. & F. 14; *R. v. Hassell*, L. & C. 58; 39 L. J. (M. C.) 175.

(d) *Reg. v. Davies*, 14 W. R. 679; 10, Cox 239.

Can., c. 92, s. 55, and that he was properly convicted on an indictment for larceny, in the ordinary form. (a)

Where the lessee of a pawn sells it, this does not constitute larceny, under the above clause. (b)

A., the proprietor of a quantity of broom-corn, delivered it to B., under the agreement that when B. should have manufactured it into brooms, he should not sell them but that A.'s clerk should sell them on A.'s account; that A. should deduct his advances from the proceeds of the sale of the brooms, and B. should have the balance. B. supplied the smaller material requisite in working up the broom-corn into brooms. B. did not keep his agreement with A., but manufactured the brooms and converted them to his own use :—*Held*, that A.'s delivery of the broom-corn to B. was a bailment to him, and that B.'s fraudulently converting it to his own use was larceny, in the terms of Con. Stats. Can., c. 92, s. 55. (c)

Upon an indictment for stealing money, the property of certain persons (composing the firm of the American Express Company,) it appeared in evidence that the agent of the Express Company in St. Mary's delivered two parcels containing \$888.22, which had been sent from Montreal by one K., addressed to E. & S. at St. Mary's, to the prisoner to deliver, and that he appropriated them to his own use. The prisoner was employed as a carrier from the Railway Station at St. Mary's to that village, and did the business of the company in that capacity, but he derived his remuneration from the persons to whom he delivered the parcels, and the company paid him nothing for his services, but employed him to give him an opportunity of making what he could out of the carriage of parcels, believing he was a trustworthy man, On the

(a) *Reg. v. Tweedy*, 23 U. C. Q. B. 120.

(b) *Gould v. Cowan*, 17 L. C. R. 46.

(c) *Reg. v. Lebaruf*, 9 L. C. J. 245.

trial at the Court of Quarter Sessions, the counsel for the Crown asked the agent of the company "when the liability of the company ceased." The prisoner's counsel objected that this question should not be allowed, being matter of law and not of fact. Upon appeal to this Court, it was held that the question was objectionable in the shape in which it was put, but that the enquiry aimed at was material to shew whether the company had undertaken to deliver the parcels, for if so, the prisoner would then be a servant set apart for that purpose, and the company would continue the bailee of the parcels until their delivery.

Secondly, that it was a question for the jury to say, whether the contract of the company with K. was to deliver the parcels to E. & S., and, if so, that the property in the money was properly laid in the indictment. Thirdly, that if the undertaking was to deliver the money to E. & S., the prisoner was the agent of the company for that purpose; and fourthly, that money is property of which a person can be bailee, so as to make him guilty of felony if he appropriates it to his own use. (a)

Upon an indictment for embezzlement, it appeared that the prisoner alone conducted an office in connection with a branch Bank, and that his salary included his services and the providing of the office in his own house, where he carried on another business. The expense of fitting up the office was borne by the bank, who provided an iron safe, their property, into which it was the prisoner's duty to put at night any money received during the day. The manager of the branch bank kept one key and the prisoner the other. It was the prisoner's duty to receive money and put it to customers' accounts with the branch, and pay checks on the branch. He fur-

(a) *Reg. v. Massey*, 13 U. C. C. P. 484.

nished to the manager a weekly account, and it was his duty to pay over weekly to the manager the excess not required at the office. He also received moneys occasionally, when required from the branch, which were entered in his weekly accounts. In September, 1855, his accounts were audited, and his cash counted and found correct, but, although for two years afterwards he furnished the weekly accounts, no examination was made during that time of the balances appearing from them to be in his hands. In September, 1857, the manager of the branch having appointed a time for examining the cash in hand, the prisoner said he was very sorry he was about £3,000 short in cash, and handed over all the cash he said was left, amounting to £755, 10, which he took from a drawer in the counter and not from the safe. He subsequently, also, admitted in writing that he had taken the amounts appearing in his weekly return of September 12, 1857, entered as a deficiency of £3,021, 9, 9. The Judge advised the jury to convict of larceny, if satisfied that any part of the sum had, at any time during the two years, been taken from the money sent by the branch, or from the money which, having been received from customers, *had been placed in the safe* and included in the weekly accounts, and the jury found the prisoner guilty of larceny, as a clerk in having stolen some money received from customers, which had been placed in the safe and made the subject of a weekly account, but that they did not find that he had stolen any of the money sent from the branch:—*Held*, that the conviction was right; that there was evidence to go to the jury of larceny, as it was to be assumed that the prisoner did his duty in putting the money received from customers during the day into the safe at night; that his exclusive possession of such money would then be determined, and



the taking be larceny, and that the finding that the prisoner stole "some money" was sufficiently certain. (a)

It seems that a married woman may be a bailee within 32 & 33 Vic., c. 21, s. 3. (b)

If the goods of the husband be taken with the consent or privity of the wife it is not larceny. (c)

A. and B, took the goods of a husband without his consent, and with the intent to deprive him absolutely of his property in them, but with the consent and privity of the wife. There was no evidence that the wife had committed, or intended to commit, adultery with either of them :—*Held*, that inasmuch as it was not left to the jury to say which was the principal in taking the goods, the wife or the strangers, it must be considered that the wife took them, and that the strangers assisted, in which case no larceny was committed. (d)

The prisoner was indicted for stealing certain chattels from his master, while in his employment. It was proved that he went off with his master's wife, *animo adulterii*, and knowingly took his master's property with him. It was objected for the prisoner that he was acting under the control of his mistress, who could not be charged with stealing from her husband, and that, therefore, the charge could not be sustained. He was, however, convicted, and the Court sustained the conviction. (e)

A servant and a bailee, at common law, are in a different position, for a bailee has the possession of the goods entrusted to him, a servant only the custody. (f) A servant, therefore, not having the lawful possession of his

(a) *Reg. v. Wright*, 4 U. C. L. J. 167; *Deara. & B.* 431; 27 L. J. (M. C.) 65.

(b) *Reg. v. Robson*, L. & C. 93; 31 L. J. (M. C.) 22; *Arch. Cr. Pldg.* 341.

(c) *R. v. Harrison*, 1 Leach, 47; *Reg. v. Avery*, 5 U. C. L. J. 215; *Bell*, 150 28 L. J. (M. C.) 185.

(d) *Reg. v. Avery*, *supra*.

(e) *Re Mutters*, 13 W. R. 326; L. & C. 511; 34 L. J. (M. C.) 54.

(f) *Reg. v. Cooke*, L. R. 1 C. C. R. 300, per *Bovill*, C. J.

master's goods, may be guilty of larceny in feloniously appropriating them.

A servant, whose duty it was to pay his master's workmen, and, for this purpose, to obtain the necessary money from his master's cashier, fraudulently represented to the cashier that the wages due to one of the workmen were larger than they really were, and so obtained from him a larger sum than was, in fact, necessary to pay the workmen. He did this, intending at the time to appropriate the balance to his own use. Out of the sum so received, he paid the workmen the wages really due to them, and appropriated the balance to his own use:—*Held*, that, whether the obtaining the money in the first instance was larceny, or obtaining the money by false pretences, the money, while it remained in the prisoner's custody, was the property and in the possession of the master, the prisoner being the servant of the latter, and therefore the appropriation of it by the prisoner was larceny. (a)

Where corn is delivered to a miller to grind, yet if he steals the meal, this is felony, being taken from the residue. (b)

The wrongful conversion of yarn entrusted to a weaver to make into cloth, is not larceny *per se*; neither was it an act of embezzlement, under the 4 & 5 Vic., c. 25, or by any of the English Acts from which that Statute was derived, even when accompanied with a criminal intention; but it would seem that the separation of one part of the yarn from the parcel delivered, with a felonious intent, would be larceny at common law. (c)

A., a shareholder in an unincorporated company, and acting as its agent, gave a promissory note, at one month, to B., another shareholder, for \$250, to meet a protested

(a) *Reg. v. Cooke*, L. R. 1 C. C. R. 295.

(b) *Young v. Sloan*, 2 U. C. C. P. 288, per *Macaulay*, C. J.

(c) *Ib.* 291, per *Sullivan*, J.

draft on the company for \$200. A. afterwards stated, at a meeting of the committee of management of the company, that he gave the note for \$250, because B. told him that M., a broker, had discounted the note for \$50; and that he (B.) could not get it discounted for a less sum. B. himself stated at the meeting that he had been obliged to pay M. the \$50 for discounting the note; and that M. had entrusted him with the collection of it, upon which representations he obtained from the treasurer of the company the money to pay the note. It was afterwards discovered that M. had never discounted the note, and that, shortly after the note was paid, B. himself admitted that it was he, and not M. who had discounted it, and that he had charged \$50 for doing so. Whereupon both A. and B. were convicted on an indictment for obtaining, by false pretences, the \$50, the money of D. and others, the shareholders in the company, with intent to defraud:—*Held*, that the conviction was bad, and that this did not constitute a false pretence under the 4 & 5 Vic., c. 25, s. 45, nor under the 18 Vic., c. 92, s. 12, and that a shareholder in such company cannot commit larceny from the company, nor be guilty of obtaining money by false pretences, inasmuch as, being a shareholder, he is joint owner of the funds and property of the company. (a)

The Police Court of the City of Toronto is a Court of Justice within the 32 & 33 Vic., c. 21, s. 18, and an indictment charging the stealing “a certain information made and subscribed by one J. M.,” at the Police Court of the said city, etc., shews an offence, within the meaning of the Statute. (b)

Maliciously destroying an information or record of the said Court is felony within the same Act.

(a) *Reg. v. St. Louis*, 10 L. C. R. 34.

(b) *Reg. v. Mason*, 32 U. C. Q. B. 246.

An indictment, describing an offence within this section as feloniously stealing an information taken in a Police Court, is sufficient after verdict. (a)

The Con. Stat. Can., c. 92, s. 26, did not make it an offence to steal an authentic copy of an *acte* or deed passed before a notary. (b)

A party could not be prosecuted, under the 4 & 5 Vic., c. 25, s. 34, for stealing fruit, "growing in a garden," unless the bough of the tree upon which the fruit was hanging was *within* the garden. It was not sufficient that the root of the tree was within the garden. (c)

In estimating the amount of the injury, under the 32 & 33 Vic., c. 21, s. 21, the injury done to two or more trees may be added together, provided the trees are damaged at one and the same time, or so nearly at the same time as to form one continuous transaction. (d)

Before the passing of the 32 & 33 Vic., c. 21, ss. 5 and 6, it was necessary that there should be a separate indictment for each act of larceny, or the prosecutor must have proved that the articles were all taken at the same time, or at several times so near to each other as to form parts of one continuing transaction, otherwise the Court would have put the prosecutor to elect for which act of larceny he would proceed. (e)

The only difference created by this Statute is, that three different acts may now be *proved* on one indictment for larceny, instead of, as formerly, only one. The law, which decides whether there are several acts, or only one, is the same as before that Statute. (f)

Before the Act is applicable, it must be established

(a) *Reg. v. Mason*, 32 U. C. Q. B. 246.

(b) *Reg. v. M'Ginnis*, 7 L. C. J. 311.

(c) *M'Donald, v. Cameron*, 4 U. C. Q. B. 1. See 32 & 33 Vic. c. 21, s. 26.

(d) *Reg. v. Shepherd*, L. R. 1 C. C. R. 118; 37 L. J. (M. C.) 45.

(e) *Reg. v. Smith*, Ry. & M. 295; Arch. Cr. Pldg. 315.

(f) *Reg. v. Firth*, L. R. 1 C. C. R. 175, per Bovill, C. J.

that there were takings at different times, which can be so calculated that it may be shewn that there is six months from the first to the last of such takings. It is only in these cases that any question arises about election. Before the act, if the takings were continuous, there was only one taking, and if there were several takings, the prisoner could only be convicted on one of them. (a) And this is still the law. (b)

A. stole gas for the use of a manufactory, by means of a pipe, which drew off the gas from the main, without allowing it to pass through the meter. The gas from this pipe was burned every day, and turned off at night. The pipe was never closed at its junction with the main, and, consequently, always remained full of gas:—*Held* that, as the pipe always remained full, there was, in fact, a continuous taking of the gas, and not a series of separate takings; and, even if the pipe had not been thus kept full, the taking would have been continuous, as it was substantially all one transaction. (c)

An indictment for larceny, drawn up according to the form given by the Con. Stats. Can., c. 99, s. 51, was held valid in arrest of judgment, notwithstanding objection that the value of the articles stolen was not alleged, nor was it stated that they were of any value, nor were they alleged to be the property of any person. (d)

The species of coin, or the nature of the bank notes, need not be alleged in any indictment for the larceny of money. (e)

On an indictment for stealing money, the property, etc., of A. B., against the form of the Statute, etc., it need not

(a) *Reg. v. Firth*, L. R. 1 C. C. R. 175, per Bovill, C. J.; *Reg. v. Bleasdale*, 2 C. & K. 765.

(b) *Ib.* per Bovill, C. J.

(c) *Reg. v. Firth*, L. R. 1 C. C. R. 172; 38 L. J. (M. C.) 54.

(d) *Reg. v. Dorion*, 8 L. C. J. 281.

(e) *Reg. Driscoll*, 8 L. C. J. 288.

be proved at the trial that the bank notes which the prisoner is accused of stealing, nor any one of them, are or is genuine, nor need the value of the notes be proved, nor that any money was due on them, and remaining unsatisfied. Nor need the existence of the banks, whose notes are pretended to have been issued, be proved. Nor is it any objection that the evidence shews that the money stolen was bank notes, if anything at all, whilst the indictment charged theft of coin. (a)

An indictment under the corresponding English section (b) of the 32 & 33 Vic., c. 21, s. 15, for stealing a valuable security, must particularize the kind of valuable security stolen, and any material variance between the description in the indictment and the evidence, if not amended, will be fatal. (c)

If, upon an indictment for stealing as the servant of the prosecutor, money alleged to be his property, it appears, from the evidence, that the prisoner stole the money from him, but that he was not his servant, the allegation in the indictment that he was his servant may be rejected as surplusage, and the prisoner may be convicted of simple larceny. (d)

An indictment charging the prisoner, with stealing bank notes "of the moneys, goods, and chattels of one J. B.," sufficiently lays the property in the notes as the words, "moneys, goods, and chattels" may be rejected as surplusage, and the indictment would then read "bank notes of one J. B." (e) As stealing bank notes is expressly made larceny, their legal character, as chattels or otherwise, is not in question, because stealing them *eo nomine* is made felony. (f)

(a) *Reg. v. Driscoll*, 8 L. C. J. 288.

(b) 24 & 25 Vic., c. 96, s. 27.

(c) *Reg. v. Lowrie*, L. R. 1 C. C. R. 61; 36 L. J. (M. C.) 24.

(d) *Reg. v. Jennings*, 4 U. C. L. J. 166; *Dears. & B.* 447.

(e) *Reg. v. Saunders*, 10 U. C. Q. B. 544; *Reg. v. Radley*, 2 C. & K. 974.

(f) *Reg. v. Saunders*, *supra*, 544, per *Robinson*, C. J.

- The prisoner was sent by his fellow workman to their common employer to get the wages due to all of them. He received the money in a lump sum, wrapped up in paper with the names of the workmen, and the sum due to each written inside :—*Held*, that he received the money, as the agent of his fellow-workmen, and not as the servant of his employer, and as the money belonged to the workmen, it was wrongly described as the property of the employer. (a) A boy, of fourteen years of age, living with, and assisting his father, in his business without wages, at one o'clock in the day succeeded his father in the charge of his father's stall, whence some goods of the latter were stolen by the prisoner :—*Held*, that in a count for larceny, the ownership of the goods could not be laid in the boy ; for he was not a bailee, but a servant. (b)

One C. was owner of an ox, and *verbally* gave it to his son, in whose name it was laid as being the owner in the indictment. There was no removal at the time of the gift, nor delivery ; nor change of possession, nor writing ; but the ox was in the son's possession at the time of the theft. On a case submitted for the opinion of this Court : *Held*—that, to make a valid gift of personal property *inter vivos*, it is not necessary that there should be an actual delivery, and change of possession. It is sufficient to complete such a gift, that the conduct of the parties should shew, that the ownership of the chattel has been changed, or that there has been an acceptance by the donee, and that therefore the property was well laid in the indictment. (c)

The prisoner was indicted for stealing the cattle of R. M. At the trial R. M. gave evidence that he was nineteen

(a) *Reg. v. Barnes*, L. R. 1 C. C. R. 45 ; 35 L. J. (M. C.) 204.

(b) *Reg. v. Green*, 3 U. U. C. L. J. 19 ; *Dears & B.* 113 ; 26 L. J. (M. C.) 17.

(c) *Reg. v. Carter*, 13 U. C. C. P. 611.

years of age ; that his father was dead ; that the goods were bought with the proceeds of his father's estate ; that his mother was administratrix, and that the witness managed the property, and bought the cattle in question. On objection that the property in the cattle was wrongly laid, the indictment was amended by stating the goods to be the property of the mother. The case proceeded and no further evidence of the administrative character of the mother was given ; the County Court Judge holding the evidence of R. M. sufficient, and not leaving any question, as to the property, to the jury. On a case reserved :—

*Held* that there was ample evidence of possession in R. M., to support the indictment, without amendment. (a) The conviction on the amended indictment was not sustainable, as the Judge had apparently treated the case, as established by the fact of the cattle being the mother's property in her representative character, of which there was no evidence, nor was any question of ownership by her, apart from her representative character, left to the jury. (b)

Formerly where goods stolen were the property of partners or joint owners, all the partners or joint owners must have been correctly named in the indictment, otherwise the defendants would have been acquitted. (c) But now the 32 & 33 Vic., c. 29 s. 17, provides that it shall be sufficient to name one of such persons, and to state the property to belong to the person so named, and another or others as the case may be. The provisions of this statute must be strictly complied with. (d) Where an indictment under 23 Vic., c. 37 s. 1, charged defendant with, procuring certain persons to cut trees, the

(a) *Reg. v. Jackson*, 19 U. C. C. P. 280.

(b) *Ib*

(c) *Reg. v. Quinn*, 29 U. C. Q. B. 163, per *Richards*, C. J.

(d) *Ib*. 163, per *Richards*, C. J.



property of A. B. & C., growing on certain land belonging to them, and the evidence shewed that the land belonged to them and another or others, as tenants in common :—*Held*, that the conviction could not be supported. (a) An indictment for breaking into a church, and stealing vestments there, and describing the goods stolen as the property of “ the parishoners of the said church, ” was held insufficient, and that they must be laid as the property of some person or persons individually. (b) But having regard to the grounds of the decision in this case, and the language of the 32 & 33 Vic., c. 29 s. 19, the writer apprehends that an indictment, in the above form, would now be sufficient.

S. and C., carmen of the Great Northern Railway Company left the station, in Middlesex, to proceed to Woolwich, in Kent, with one of the company’s waggons, and, before starting, the usual oats, etc. for provender for the horses were given out to them and placed in the waggon in nosebags ; at Woolwich, they took the nosebags from the waggon and delivered them to B. an ostler for 6d. Upon an indictment at the Middlesex Sessions against S. and C. for stealing the oats, etc. and of B. for receiving, they were found guilty :—*Held*, that the case was within 7 Geo. 4 c. 64 s. 13 ; (c) and that though the offences were committed in Kent, the prisoners might be tried in Middlesex. (d)

The prisoner stole a watch at Liverpool, and sent it by rail to a confederate in London :—*Held*, that the constructive possession, which is equivalent to the actual possession, still remained in the prisoner and that, under the 24 & 25 Vic. c. 96 s. 114, (by which the prisoner may be

(a) *Reg. v. Quinn*, 29 U. C. Q. B. 158.

(b) *Reg. v. O’Brien*, 13 U. C. Q. B. 436.

(c) See 32 & 33 Vic. c. 29, s. 9.

(d) *Reg. v. Sharp*, 1 U. C. L. J. 17 ; *Dears. C. C.* 415.

indicted, where he has the property in his possession, though stolen in another part of the United Kingdom) he was triable at the Middlesex Sessions. (a)

On an indictment charging a larceny of goods in New Brunswick, it appeared that the goods were taken in the State of Maine, and brought into New-Brunswick:—*Held*, that, in the absence of proof that the taking was larceny, according to the law of Maine, the prisoner could not be convicted of larceny in New-Brunswick, under the Rev. Stats. c. 158 s. 8. (b)

Larceny committed on board a ship at sea, on a voyage from Ireland to St. John, New-Brunswick, does not come within the Rev. Stats. c. 158 s. 10, but may be tried under the 18 & 19 Vic., c. 91. (c)

When a count for larceny charges the stealing of a great number of things, a general verdict of guilty will be supported by evidence that any one of the things mentioned has been stolen, notwithstanding there is no evidence as to the rest. (d)

Where upon an indictment against a defendant, as servant, for stealing, there was no count for embezzlement, but there was evidence of embezzlement but not of stealing, and the jury found a general verdict of guilty, the conviction was quashed. (e) The value of the property is now immaterial, (f) and, where the value is not of the essence of the offence, no statement of value or price is necessary in the indictment. (g)

If a larceny be committed by a lodger, the goods may be described as the property of the owner or person letting to hire. (h)

(a) *Reg. v. Rogers*, L. R. 1 C. C. R. 136; 37 L. J. (M. C.) 83.

(b) *Reg. v. Hill*, M. T. 1863.

(c) *Reg. v. Dillon*, H. T. 1864, Supreme Court, New Brunswick.

(d) *Reg. v. Johnson*, 4 U. C. L. J. 49; 1 Dears. & B. C. C. 340.

(e) *Reg. v. Gorbett*, 3 U. C. L. J. 60; Dears. & B. 166; 26 L. J. (M. C.) 47.

(f) 32 & 33 Vic. c. 21, s. 2.

(g) 32 & 33 Vic. c. 29, s. 23.

(h) 32 & 33 Vic. c. 21, s. 75. See *Reg. v. Healey*, 1 Mood. C. C. 1.

*Stealing from the person.*—To constitute a stealing from the person, the thing stolen must be completely removed from the person. (a)

In order to bring a case within the 32 & 33 Vic., c. 21, s. 44, the demand, if successful, must amount to stealing, and to constitute a menace, within that section, it must be of such a nature as to unsettle the mind of the person upon whom it operates, and to take away from his acts that element of voluntary action which alone constitutes consent; it must, therefore, be left to the jury to say whether the conduct of the prisoner is such as to have had that effect upon the prosecutor. (b)

Where a policeman professing to act under legal authority, threatens to imprison a person, on a charge not amounting to an offence in law, unless money be given him, and the person, believing him, gives the money, the policeman may be indicted under that section, although he might also have been indicted for stealing the money. (c)

To constitute an attempt to steal, some act must be done towards the complete offence. Feeling a coat-tail to ascertain if there is anything in the pocket, is not an attempt to do the act of picking the pocket, for it may be that nothing was found to be in it, and therefore the prisoner does not proceed to the commission of the act itself, and, if there is nothing in the pocket, even putting the hand into it has been held not to be an attempt to steal. (d)

The prosecutor carried his watch in his waistcoat pocket, the chain attached passing through a buttonhole of the waistcoat, and being there kept from slipping

(a) 2 Russ. Cr. 359.

(b) *Reg. v. Walton*, L. & C. 288; 32 L. J. (M. C.) 79.

(c) *Reg. v. Robertson*, L. & C. 483; 34 L. J. (M. C.) 35.

(d) *Reg. v. Taylor*, 8 C. L. J. N. S. 55, per *Sergeant Cox*.

through by a watch key. The prisoner took the watch out of the pocket, and drew the chain out of the button-hole, but, his hand being seized, it appeared that, although the chain and key were drawn out of the button-hole, the point of the key had caught up another button, and was thereby suspended :—*Held*, that the evidence was sufficient to warrant a conviction for stealing from the person. (a)

Demanding, with menaces, money actually due is not a demanding with intent to steal, under the Con. Stats. Can., c. 94, s. 4. (b)

Upon the trial of an indictment for stealing fowls, the property of O., he was unable to say that any of his fowls were missing ; but it was proved that the prisoner was met by a police constable at about 1 o'clock in the morning, going towards his own house, and within twelve hundred yards from O.'s premises, when he threw down dead fowls, warm and bleeding, and ran towards his own house. His footsteps were visible in the snow from where he was met to the premises, and the knees of his cord trousers were covered with the wet dung of fowls, and in O.'s fowl-pen, under the roosts, marks of the knees of cord trousers were found, and on the floor fresh feathers as if from a fowl's neck, and on the following morning the doors of the fowl-pen, and of other buildings, which had been closed on the previous night, were found open :—*Held*, that there was evidence to go to the jury, and that a conviction was right. (c)

The Court of Queen's Bench had, at common law, no jurisdiction to issue a writ of restitution, except as part of the judgment on an appeal of larceny. The 21 Hy. 8,

(a) *Reg. v. Simpson*, 1 U. C. L. J. 16 ; Deare. 621 ; 24 L. J. (M. C.) 7 ; see also *Reg. v. Thompson*, 1 Mood. C. C. 78.

(b) *Reg. v. Johnson*, 14 U. C. Q. B. 569.

(c) *Reg. v. Mockford*, 16 W. R. 375.

c. 11, and 24 & 25 Vic., c. 96, s. 100. only confers this jurisdiction on the Court before whom the felon has been convicted. Where, therefore, a person had been convicted of house-breaking and larceny before the Central Criminal Court, the Court of Queen's Bench has no power to award a writ of restitution of the proceeds of the larceny. (a)

*Embezzlement.*—This offence is defined to be the act of appropriating to himself that which is received by one person in trust for another. (b) But in this large sense it was not criminal at common law, nor has it been rendered so by statute. The Legislature, however, has from time to time specified different classes of cases, all coming within the meaning of the term embezzlement in the above sense, which it has declared to be criminal. (c)

Embezzlement, in its usual acceptation, imports the reception of money belonging to the master or employer of him who receives it in the course of his duty, and the fraudulent appropriation of that money before it gets into the possession of the master. (d) Embezzlement as a substantive felony, was not an offence known to the common law. (e)

Where, on an indictment against the treasurer of a county, for embezzling the sum of £9. 14s. 10d. received for taxes, it appeared that the defendant received the money in October, 1858, and resigned in February, 1859, when his books were taken from him by the warden, although the usual time for making up his accounts with the County had not arrived. This sum was not entered in his books

(a) *Reg. v. Ld. Mayor, London*, L. R. 4 Q. B. 371. See now 32 & 33 Vic. c. 21, s. 113.

(b) *Reg. v. Cummings*, 4 U. C. L. J. 183, per *Blake*, Ch.

(c) *Ib.* 183, per *Blake*, Ch.

(d) *Ferris v. Irwin*, 10 U. C. C. P. 117, per *Draper*, C. J.

(e) *Reg. v. Cummings*, *supra*, 184, per *Draper*, C. J.

as received, nor was there any entry of other moneys received for taxes at a later date, but, after his books had been taken, he sent in a list of moneys received including this, although before he did so it had been stated in a newspaper that this and other payments were not accounted for. There was no proof that he was indebted to the County on the whole of his accounts, and it was shewn that he claimed they were in his debt, and that the question was pending before arbitrators to whom several civil suits between himself and the Council had been referred. The jury, having found the defendant guilty :—*Held*, that the evidence did not warrant the conviction. (a)

An officer of a friendly society, some of whose rules were in restraint of trade, having embezzled their money, it was held that societies having such rules are, under the 32 & 33 Vic, c. 61, entitled to the protection of the criminal law for their funds, and, consequently, that the officer might properly be convicted of embezzlement, in the same manner as if he had embezzled the money of any person not acting in restraint of trade. (b)

Where a married woman was adjudicated a bankrupt on her own petition, in which she described herself as a widow, and was afterwards convicted under the 24 & 25 Vic., c. 134, s. 221, of having embezzled her property :—*Held*, that the conviction was wrong, as the property was her husband's. (c)

It has been held that a school trustee having money in his hands, not as secretary and treasurer of a board or in any official capacity, could not, either under the 51st or 56th section of the Con. Stats. Can., c. 92, embezzle such money, his duty as trustee not requiring or authorizing

(a) *Reg. v. Bullock*, 19 U. C. Q. B. 513.

(b) *Reg. v. Stainer*, L. R. 1 C. C. R. 230; 39 L. J. (M. C.) 54.

(c) *Reg. v. Robinson*, L. R. 1 C. C. R. 80; 36 L. J. (M. C.) 78.

him to receive it, and he not receiving it as part of **his** duty or employment as servant, clerk or employee of some superior. (a) Now, however, by the 32 & 33 Vic, c. 21, s. 70, it is not necessary that the money should be received "by virtue of such employment."

In an indictment for embezzling money, the property of a trustee of a savings bank, it is not enough to shew that the trustee merely acted as such on one occasion, without producing direct evidence of his appointment as such trustee. (b)

A person, who is employed to get orders for goods, and to receive payment for them, but who is at liberty to get the orders and receive the money where and when he thinks proper, being paid by commission on the goods sold, is not a clerk or servant within the meaning of the 24 & 25 Vic., c. 96, s. 68. (c) But the conclusion to be drawn from the cases appears to be that a commercial traveller, whether paid by commission or salary, who is under orders to go here and there is a clerk or servant, within the meaning of the statute. (d)

A. was treasurer of a friendly society whose rules directed that all the moneys of the society should be paid to the treasurer, and that he should make no payments except on an order signed by the secretary and countersigned by the chairman or a trustee, and that he should give security. By another rule all the moneys of the society were vested in trustees. A. was a member of the society but received no payment for filling the office of treasurer :—*Held*, on an indictment against A., as clerk and servant of the trustees of the society, for embezzling money which he had received as treasurer, that he was

(a) *Ferris v. Irwin*, 10 U. C. C. P. 116.

(b) *Reg. v. Essex*, 4 U. C. L. J. 73; *Dears. & B.* 371; 27 L. J. (M. C.) 20.

(c) *Reg. v. Bowers*, L. R. 1 C. C. R. 41; 35 L. J. (M. C.) 206.

(d) *Arch. Cr. Pldg.* 448; *Reg. v. Mayle*, 11 Cox, 150; *Reg. v. Marshall*, 11 Cox, 490.

not the clerk or servant of the trustees within the meaning of the above clause. (a)

Prior to the passing of the 32 & 33 Vic., c. 21, s. 38, a person who had an interest in any money or other property, as the secretary of a society or a partner or beneficial owner, could not be convicted on an indictment charging him with embezzling the money, as the servant of one of the others interested, "and another or others," pursuant to c. 29, s. 17, for the "others" would have comprised himself, and so the indictment would, in fact, have charged him with embezzling his own money, as his own servant. (b) By the above statute this difficulty is now obviated.

The prisoner being the secretary of a money club regulated by rules, which, as well as the practice of the club, were stated in the case, was directed by the club to sue upon a joint promissory note, the property of the club, or get better security, and the note was handed to him by W., the treasurer, who was not a member of the club, and who, at the same time, desired that his name should not be used in legal proceedings. The prisoner indorsed W.'s name on the note, employed an attorney who issued a writ, and, in consequence of the action, the money was paid to the prisoner by one of the joint makers, which he fraudulently withheld from the club, and appropriated. The duties of the prisoner stated, in the rules of the club, comprised duties cognate to that of receiving money for the club, but not expressly that duty:—*Held*, that the prisoner had received the money as servant, for the use of the club, and that he was properly convicted of embezzlement:—*Held*, also that the employment to receive money was sufficient, though receiving money

(a) *Reg. v. Tyree*, L. R. 1 C. C. R. 177; 38 L. J. (M. C.) 58.

(b) See *Reg. v. Diprose*, 11 Cox, 185; *Reg. v. Taffs*, 4 Cox, 169; *Reg. v. Brea*, L. & C. 346; 33 L. J. (M. C.) 59; Arch. Cr. Pldg. 449.



was not the prisoner's usual employment, and it was the only instance in which he was so employed. (a)

A "charter master," who received a certain sum for every ton of coal he raised, was also allowed to sell coal for his employer, the owner of the colliery. It was the prisoner's duty to pay over the gross money received on such sales, and he was subsequently allowed a poundage thereon. The prisoner having converted money received for coal to his own use, and neglected to account for it: —*Held*, that, although the sale of the coal was not compulsory, he was servant to the colliery, so as to support an indictment for embezzlement. (b)

A person engaged by a manufacturer as a commercial traveller, to be paid by commissions, with liberty to take orders for others, is a servant. (c)

It is no defence to an indictment for embezzlement, that the prisoner intended to return the money fraudulently appropriated. (d)

A conviction for embezzlement has been supported, though it appeared that the prisoner entered the sum appropriated in his master's ledger. (e) Where a person receives money, and pays it away and omits to credit it as received, but charges it as paid away, for the fraudulent purpose of concealing an appropriation by him of that amount to his own purposes, or to purposes other than those within the scope of his authority or duty, this is evidence from which a jury may infer an embezzlement by him of that sum. (f)

It seems a person cannot be convicted of embezzlement, unless he is shewn to have received some particu-

(a) *Reg. v. Tongue*, 8 U. C. L. J. 55; Bell, 289; 30 L. J. (M. C.) 49.

(b) *Reg. v. Thomas*, 1 U. C. L. J. 37; 6 Cox, C. C. 403.

(c) *Reg. v. Tite*, 7 U. C. L. J. 331; L. & C. 29; 30 L. J. (M. C.) 142.

(d) *Reg. v. Cummings*, 4 U. C. L. J. 189, per *Spragge*, V. C.

(e) *Reg. v. Lister*, 3 U. C. L. J. 18; Dears. & B. 119; 26 L. J. (M. C.) 26.

(f) *Reg. v. Cummings*, 4 U. C. L. J. 185, per *Draper*, C. J.; *R. v. Groves*, 1 Mood. C. C. 447.

lar sum from his employer, or to have converted the whole or part of it to his own use, (a) or unless he also deny the receipt of it or the like. (b) It seems also insufficient to prove a general deficiency of account, and that some specific sum must be proved to have been embezzled. (c)

Where the prisoner was indicted as an agent, under 4 & 5 Vic., c. 25 s. 41, for unlawfully keeping and converting a promissory note to his own use :—*Held*, that the words “ or other agent ” did not extend the meaning of the previous words “ banker, merchant, broker, attorney, ” but only signified persons the nature of whose occupation was such that chattels, valuable securities, etc. belonging to third persons would, in the usual course of their business, be entrusted to them. (d)

The indictment charged that one M. entrusted to the defendant, then being an agent, a promissory note of one B. for \$200, for the special purposes of receiving £6, thereon from A., and that the defendant, contrary to the purpose for which the said note was entrusted to him, did unlawfully negotiate, and convert the same to his own use. It appeared that K. had made the note for A's accommodation, and, A. being indebted to one C. in £6, it was agreed that he should deposit this note with M. to secure the payment. Defendant, by A.'s order, got the note from M., on condition that he should give it up to A. on the £6 being paid; A. afterwards paid this sum to defendant, but the latter kept the note, and sued K. upon it, alleging that he was entitled to do so by some arrange-

(a) *R. v. Chapman*, 1 C. & K. 119, per *Williams*, J. ; *R. v. Jones*, 7 C. & P. 833, per *Bolland*, B. ; *Reg. v. Wolstenholme*, 11 Cox, 313, per *Brett*, J. ; but see *R. v. Lambert*, 2 Cox, 309, per *Erle*, J. ; *R. v. Moah*, Dears. 626 ; 25 L. J. (M. C.) 66.

(b) *Ib.*

(c) *R. v. Loyd Jones*, 8 C. & P. 288, per *Alderson*, B. ; *Reg. v. Cummings*, 4 U. C. L. J. 185, per *Draper*, C. J.

(d) *Reg. v. Hynes*, 13 U. C. Q. B. 194.

ment with K., which the jury found was not the case and convicted the defendant :—*Held*, that the conviction could not be sustained, for defendant was not an agent within the meaning of the Con. Stat. Can. c. 92, s. 44, which refers only to general agents of the description specified. (a) These decisions will apply to the 32 & 33 Vic., c. 21 s. 76-7. (b)

The 32 & 33 Vic. c. 21 s. 70, only applies to cases, where the chattel money or valuable security is received from third persons, on account of the master, and *not* where it is received directly from the master.

The prisoner, being a clerk in the Bank of Upper Canada, was placed in an office, apart from the bank, and entrusted with funds for the purpose of paying, persons having claims upon the Government, which payments were made upon the cheques of the Receiver-General, whose office was in the same building. While so employed, a deficiency was discovered in his accounts, which he at first ascribed to a robbery, but he afterwards confessed that he had lent the moneys entrusted to him, to various friends. It also appeared that, on a certain day, he had received a cheque from the Receiver-General for £1439.15 for coupons on Government debentures held by the bank, and had credited himself in account with that sum, as if paid out by him, on the cheques, making no entry of the coupons thus covering his deficiencies by so much, and making it appear that he had paid out the amount of the cheque in cash when he, in fact, had paid nothing. The indictment charged that on, etc., the prisoner being a clerk, then employed in that capacity by the bank, did then and there, in virtue thereof, receive a certain sum, to wit £1439 15s., for and

(a) *Reg. v. Armstrong*, 20 U. C. Q. B. 245.

(b) See also *Heseler and Shaw*, 16 U. C. Q. B. 104; *Sandiman v. Breach*, B. & C 100.

on account of the said bank, and the said money feloniously did embezzle. The indictment also contained another count, but, the jury having found a general verdict of "guilty of embezzlement," the verdict was attempted to be supported exclusively on the first count; the Court held that the indictment was framed on the Con. Stats. Can. c. 92 s. 42; (a) that the form used was applicable only to that clause of the statute; that, under it the offence consisted in receiving money, etc. from *third* persons on account of the master or employer, and not in being *entrusted* with it by the master or employer (which in this particular case was the bank), and as the evidence shewed that the money embezzled was received from the bank, and not from *third* persons on their account, that the indictment was not supported by the evidence. (b)

There may, however, be an embezzlement by a clerk or servant of money received *from*, as well as money received *for*, the master. The difference is, that, in the first case, the offence is a larceny at common law, when not a mere breach of trust, in which event it may be a question whether the misapplication of the money would, strictly speaking, be embezzlement at all. (c) In the second case, the offence, however fraudulent, would not be larceny, or indictable at common law. (d)

Where the prisoner, a bank clerk, was indicted for embezzlement, and the weight of evidence established that the money embezzled was in the actual possession of the bank, at the time of the fraudulent appropriation: — *Held*, that a conviction for embezzlement could not be

(a) See 32 & 33 Vic., c. 21, s. 70.

(b) *Reg. v. Cummings*, 4 U. C. L. J., 182.

(c) *R. v. Hawtin*, 7 C. & P. 281; *R. v. Tholey*, 1 Mood. C. C. 343. See also *R. v. Peck*, 2 Russ. 180; *R. v. Smith*, R. & R. 267; *R. v. Hawkins*, 1 Den. 584; *R. v. Goodenough*, Dears. 210.

(d) *Reg. v. Cummings*, 4 U. C. L. J. 187, per Macaulay, C. J.

sustained on that evidence, but a conviction for larceny would be right. (a)

The 32 & 33 Vic., c. 21, s. 70, makes the embezzlement felony, of a character previously known to the common law—namely, larceny. It, in effect, makes the act of embezzlement proof of a larceny. (b) Now, by s. 74, persons indicted for embezzlement may be convicted of larceny, and *vice versa*.

On an indictment under the corresponding English section of the 32 & 33 Vic., c. 21, s. 73, it appeared that the prisoner was a member of a copartnership. It was his duty to receive money for the copartnership, and once a week to render an account, and pay over the gross amount received during the previous week, which was usually received in a number of small sums from day to day. He was indicted for embezzling three different sums, amounting, in the aggregate, to £3, 13s., received into his possession on the 5th, 12th, and 17th days of December, 1870, respectively, being within six months from the first to the last of the said receipts. It appeared, in evidence, that the said aggregate sum was received by ten small payments for the first and second weeks respectively, and eleven small payments in the third week. The counsel for the prisoner objected that this would be admitting evidence of thirty-one different acts of embezzlement upon one indictment, whereas the Statute only permitted evidence to be given of three, within the space of six months, from the first to the last of such acts. On the other side, it was contended that, as it was the prisoner's duty to account once a week only for what he had received during the previous week, there were only three distinct non-accountings, and that

(a) *Reg. v. Cummings*, 4 U. C. L. J. 185, per *Draper*, C. J.; *R. v. Chapman*, C. & K. 119; *R. v. Holloway* 1 Temp. & M. 40; *Reg. v. Hall*; *Ib.* 47.

(b) *Reg. v. Cummings*, *supra*, 184, per *Draper*, C. J.

the act of embezzlement was not committed on receipt of the money, but upon the non-accounting and non-payment of it:—*Held*, that the prisoner might be properly charged with embezzling the weekly aggregates—that three acts of embezzlement of such weekly aggregates, within six months, might be charged and proved under one indictment, and that evidence of the small sums received during each week was admissible, to shew how the weekly aggregates were made up. (a)

But if a man receives a number of small sums, and has to account for *each* of them separately, only three instances of failure to account can be proved under one indictment. In the above case, the prisoner might have been indicted for embezzling any of the separate small sums received by him. (b)

The 32 & 33 Vic., c. 29, s. 25, does not justify an allegation in an indictment of the embezzlement of money when a cheque only has been embezzled, and there is no proof that the prisoner has even cashed it. (c) But if the cheque is turned into money, the prisoner may be indicted for embezzling the money; and, upon such indictment, the embezzlement of the cheque, and conversion of it into money, may be shewn, or the prisoner may be indicted for the embezzlement of the cheque. (d)

In *Reg. v. Bullock*, (e) it was held, under the facts shewn in the case, that the money was not improperly charged to be the money of the County of Essex, though it was received for the Township of Maidstone, within the county, and was to be accounted for to it by the county; for, from the moment of payment, the county

(a) *Reg. v. Balls*, L. R. 1 C. C. R. 328.

(b) *Ib.* 332-3, per Cockburn, C. J.

(c) *Reg. v. Keena*, L. R. 1 C. C. R. 113; 37 L. J. (M. C.) 43.

(d) *Ib.* 114, per Cockburn, C. J.

(e) 19 U. C. Q. B. 513; *ante*. 320-1.

was responsible for the money, and had a special property in it.

A person who is nominated and elected assistant-overseer, under the 59 Geo. 3, c. 12, s. 7, by the inhabitants of a parish in vestry, and who is afterwards appointed assistant overseer by the warrant of two Justices, and performs the duties of an overseer, is well described in an indictment for embezzlement as the servant of the inhabitants of the parish. (a)

It has been held that the form of indictment, given by the Con. Stats. Can., c. 99, s. 51, was only applicable to embezzlement under c. 92, s. 42. (b)

The Legislature did not intend to frame a form of indictment for embezzlement which should be universally applicable, but only to furnish the form of indictment for one species of embezzlement, as a model upon which indictments for other species of embezzlement might be framed. (c)

The form of indictment "did feloniously embezzle" shews it is inapplicable to embezzlement when a misdemeanor; and it would seem, from these words, that the form is applicable to embezzlement as a substantive felony. (d)

Embezzlement, not being a substantive offence known to the common law, like larceny, but existing by statute, and some rendering it a felonious stealing, others simply felonious, and others a misdemeanor only, the meaning of the form is doubtful. (e) But only one species of embezzlement is contemplated, because the form follows the statutory description of one species of embezzle-

(a) *Reg. v. Carpenter*, L. R. 1 C. C. R. 29; 35 L. J. (M. C.) 169.

(b) *Reg. v. Cummings*, 4 U. C. L. J. 182 (in E. & A.)

(c) *Ib.* 183, per *Blake*, Ch.

(d) *Ib.* 184, per *Draper*, C. J.

(e) *Ib.* 188, per *Macaulay*, C. J.

ment. (a) It would seem that the form given by the 32 & 33 Vic. c. 29, p. 290, is only applicable to an embezzlement under c. 21, s. 70.

Under an ordinary indictment for larceny, the embezzlement of money received by a clerk or servant, for or on account of his employer, and fraudulently converted while in *transitu*, cannot be proved; and although the Act on which the indictment is framed makes the embezzlement within it a larceny, it is necessary to charge the offence specially in the terms of it as against the Statute, and not at common law, it not being a common law offence; and an indictment under the 32 & 33 Vic., c. 21, s. 70, is not sustained in evidence by proof of a larceny at common law. (b)

In an indictment for embezzlement, where the offence relates to any money, or any valuable security, it shall be sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained by proof of the embezzlement of any amount, although the particular species of coin, or valuable security, of which such amount was composed, is not proved, etc. (c)

Upon an indictment for embezzlement under the Con. Stats. Can., c. 92, s. 42, it must have appeared in evidence that the defendant received the money, etc., "by virtue of his employment." (d)

S. 70 of the 32 & 33 Vic., c. 21, omits the words "by virtue of such employment," and, therefore, if a man pay a servant money for his master, and the servant embezzles it, the case will be within the present enactment, although

(a) *Reg. v. Cummings*, 4 U. C. L. J. 184, per *Spragge*, V. C.

(b) *Ib.* 187, per *Macaulay*, C. J.

(c) 32 & 33 Vic., c. 21, s. 73. See *R. v. Hall*, 3 Stark, 67; R. & R. 463.

(d) See *Reg. v. Thorley*, 1 Mood. C. C. 343; *R. v. Hawtin*, 7 C. & P. 281; *R. v. Mellish*, R. & R. 80; *R. v. Snowley*, 4 C. & P. 390.



it was neither the duty of the servant to receive it, nor had he authority to do so. (a)

*False Pretences.*—The law as to false pretences has been construed, of late years, in a much more liberal spirit than formerly. (b)

It has been well remarked, that, in order to support an indictment for obtaining money, etc., by false pretences, there must be a pretence of an existing fact. It must appear that the party defrauded has been induced to part with his money by the pretence, and the pretence must be untrue. (c)

Where the prisoner was convicted for obtaining money by falsely pretending that he carried on an extensive business as a surveyor and house agent, and that he had employment for several clerks, to collect rents, and assist in the conduct of the said business. The jury found that he carried on no business whatever:—*Held*, that the conviction was right, as there was a false pretence of an existing fact, the party defrauded was induced to part with his money by the pretence, and the pretence was untrue. (d)

Numerous cases have fully established that there must be a false pretence of an *existing* fact, and that a *promise to do* an act will not suffice.

Proof that the defendant had procured from the private prosecutor a promissory note, by a promise to give the prosecutor \$600 on what he would have out of the proceeds of the note, when discounted, is not sufficient to sustain a conviction on an indictment for obtaining the signature of the prosecutor to a promissory note, with intent to defraud. (e)

(a) See Arch. Cr. Pldg. 453.

(b) *Reg. v. Lee*, 23 U. C. Q. B. 340, per *Hagarty*, J.

(c) *Reg. v. Crab*, 5 U. C. L. J. N. S. 21, per *Kelly*, C. B. ; 11 Cox, 85.

(d) *Ib.*

(e) *Reg. v. Pickup*, 10 L. C. J. 310.

If the law were otherwise, every man who purchased goods, stating that he would pay for them the next week, and who failed to pay for them, could be prosecuted criminally, instead of being sued. (a)

There must be a false pretence of a present or past fact, and a promissory pretence to do an act is not within the Statute. (b)

The prisoner, in company with one D., whose note he held, came to the store of H. and F., where an agreement was entered into between the parties that D. would pay for all the goods furnished by H. and F. to the prisoner, on the amount being endorsed on his (D.'s) note held by the prisoner. The prisoner called several times at H. and F.'s with the note mentioned, obtained goods and had the amount endorsed on the note. In July, 1863, he called without the note and induced H. and F. to let him have goods, saying "he would bring down the note and have the amount endorsed in a day or two." The day after the prisoner met D., and told him to pay nothing to H. and F. beyond what he would find endorsed on the note, alleging that he had got some goods but it was "in his own book." The prisoner did not afterwards present the note, in fulfilment of his promise, to have the amount endorsed thereon. The jury found that when the goods were obtained from H. and F. the prisoner did not intend to bring the note, or to pay for the goods. The prisoner having been indicted at the Quarter Sessions and found guilty, judgment was postponed and the case reserved under Con. Stats. U. C., c. 112, for the opinion of this Court :—*Held*, that the conviction must be annulled, as there was no false representation or pretence of an exist-

(a) *Reg. v. Pickup*, 10 L. C. J. 312, per *Duval*, C. J.

(b) *Reg. v. Gemmell*, 26 U. C. Q. B. 314, per *Hagarty*, J.; *Reg. v. Giles*, 11 L. T. Reps. N. S. 643; 10 Cox. 44.

*ing fact*, but a mere *promise* of defendant which he failed to perform. (a)

It was suggested that the conviction in this case might be sustained under the (then) Con. Stats. C., c. 99, s. 62, as the facts appearing on the trial would warrant a conviction of larceny, and consequently under that section the conviction ought to stand, but, per *Richards*, C. J. (b) “I am by no means certain that this section is not intended to apply to those cases only where the false pretences shewn on the trial amount to larceny, and when, but for this provision, the misdemeanor would be merged in the felony, and the prisoner might claim to be acquitted on that ground,” and he added that without expressly deciding this point the charge of larceny could not be sustained, on the facts proved at the trial, and that the conviction, therefore, failed on both grounds,

A false representation by a married man,—whereby a single woman is induced to part with her money to him,—that he is a single man ; that he will furnish a house with the money and marry the woman is sufficient to support a conviction for obtaining money under false pretence ; for, although the two last statements are mere false promises to do something in future, and as such are insufficient, the pretence of being a single man is a pretence of an essential fact. (c) One false fact by which the money is obtained is sufficient to support the indictment, although it may be united with false promises which would not of themselves do so. (d)

Not only is it necessary that there be a false pretence of an existing fact, but the prosecutor must be induced to part with his property in consequence of the false pre-

(a) *Reg. v. Bertles*, 13 U. C. C. P. 607.

(b) *Ib.* 610.

(c) *Reg. v. Jennison*, 9 U. C. L. J. 83 ; 6 L. T. Reps. N. S. 256 ; 31 L. J. (M. C.) 146.

(d) *Ib.* ; *Reg. v. Lee*, 23, U. C. Q. B. 340, per *Hagarty*, J.

tence ; it must be the motive operating in his mind and inducing him to part with the money. If the money is parted with from a desire to secure the conviction of the prisoner, it will not be an obtaining by false pretences. (a)

On an indictment for obtaining money by false pretences it appeared that G., the prisoner, and another were in a boat on the Bay, at Toronto, and the prosecutor, M., agreed with them to take him to meet a steamer, the prisoner's companion saying the charge would be 75c. at the steamer. The prosecutor, according to his own account, took out a \$2 bill, saying he would get it changed. Prisoner said "I'll change it," and on the prosecutor asking him if he had change, said "I think I have," after which the prosecutor handed him the bill, and he shoved off with it. There was no evidence to shew what was the motive operating in the prosecutor's mind, inducing him to part with the money ; it was, therefore, held a conviction for obtaining the money by false pretences could not be sustained. The Court considered that, although this was a false pretence of an existing fact, namely, that the prisoner had change, yet there was nothing to shew that the prosecutor was induced to part with his money by means of the false pretence, which they held necessary. (b)

Where the defendant and one C. represented to the prosecutor that they each owned a lot of land, and were men of means, which was false, and thereby induced the prosecutor to sell his horses to them, taking a note made by the defendant and endorsed by C., but, on the latter afterwards repudiating his liability on the note, the prosecutor went to the defendant the next day, and entered

(a) *Reg. v. Mills*, 29 L. T. Reps. 114, Dears. & B. 205 ; 26 L. J. (M. C.) 79 ; *Reg. v. Gemmell*, 28 U. C. Q. B. 315, per *Hagarty*, J. See also *Reg. v. Dale*, 7 C. & P. 352 ; *Reg. v. Roebuck*, Dears. & B. 24 ; 25 L. J. (M. C.) 101.

(b) *Reg. v. Gemmell*, 28 U. C. Q. B. 312.

into an agreement in writing with him, that the latter should pay \$149 for the horses, or return them within a month :—*Held*, that this evidence, in conjunction with the writing, repelled the idea that the prosecutor parted with his property in consequence of any false pretence set up by defendant and concurred in by C. That the property was parted with under the agreement in writing, and the defendant could not be held liable when the prosecutor consented to the property passing from him, under quite a different arrangement from that out of which the false pretence arose. (a)

An indictment for obtaining from A. \$1200 by false pretences, is not supported by proof of obtaining A.'s promissory note for that sum, which A. afterwards paid before maturity, inasmuch as it was an engagement or promise to pay at a future date, and, though remotely, the payment arose from the false pretence ; yet immediately and directly it was made, because the prosecutor desired to retire his note, and did so before it became due, and, though the false pretences, on which the note was obtained, might be said to be continuing, they were not according to the evidence, made or renewed when the note was paid. (b)

The crime of obtaining goods by false pretences is complete, although, at the time when the prisoner made the pretence and obtained the goods, he intended to pay for them, when it should be in his power to do so. (c)

A person who, by falsely representing himself to be another person, induces another to enter into a contract with him for board and lodging, and is supplied, accordingly, with various articles of food, cannot be indicted for obtaining goods by false pretences, the obtaining of

(a) *Reg. v. Connor*, 14 U. C. C. P. 529.

(b) *Reg. v. Brady*, 26 U. C. Q. B. 13.

(c) *Reg. v. Naylor*, 1 L. R. 1 C. C. R. 4 ; 35 L. J. (M. C.) 61.

the goods being too remotely connected with the false representation. (a)

A conviction for obtaining a chattel by false pretences is good, although the chattel is not in existence at the time the pretence is made, provided the subsequent delivery of the chattel is directly connected with the false pretence, and whether or not there is such a direct connection is a question for the jury. (b) The test is the continuance of the pretence down to the time of delivery, and the direct connection between the pretence and delivery. (c)

The word "obtain" in the 32 & 33 Vic., c. 21, s. 93, does not mean obtain the loan of, but obtain the *property* in, any chattel, and, to constitute an obtaining by false pretences, it is essential that there should be an intention to deprive the owner wholly of the property in the chattel, and an obtaining by false pretences the *use* of a chattel for a limited time only, without an intention to deprive the owner wholly of the chattel, is not an obtaining by false pretences within the Statute. (d)

The term "valuable security," used in the Statute, means a valuable security to the person who parts with it on the false pretence, and the inducing a person to execute a mortgage on his property, it not appearing that the paper on which it was drawn belonged to the prosecutor, is, therefore, not obtaining from him a valuable security within the meaning of the Act. (e)

Upon an indictment for obtaining money by false pretences in change for a bank-note, it was proved that the note was one of a private bank, which had paid a divi-

(a) *Reg. v. Gardner*, 2 U. C. L. J. 139; *Deara. & B.* 40; 25 L. J. (M. C.) 100. See, however, comments on this case in *Reg. v. Martin*, L. R. 1 C. C. R. 56, *infra*.

(b) *Reg. v. Martin*, L. R. 1 C. C. R. 56; 36 L. J. (M. C.) 20.

(c) *Ib.* 60, per *Bovill*, C. J.

(d) *Reg. v. Kilham*, L. R. 1 C. C. R. 261; 39 L. J. (M. C.) 109.

(e) *Reg. v. Brady*, 26 U. C. Q. B. 13.

dend of 2s. 4d. in the pound, and no longer existed : and that a neighbouring bank would not change it :—*Held*, that the above was not evidence from which it could be inferred that the note was of no value whatever, (a)

It is not necessary that the pretence should be in words ; the conduct and acts of the party will be sufficient without any verbal representation.

An indictment alleged that the prisoner was in the employ of V., as a hewer of coals, and was entitled to 5d. for every tub filled by him, and that, by unlawfully placing a token upon a tub of coals, he falsely pretended that he had filled it, whereby he obtained 5d. The prisoner having been convicted :—*Held*, that, as there was evidence the prisoner had acted the false pretence, the conviction was right. (b)

Where, on an indictment for attempting to obtain money by certain false pretences, the evidence shewed that the defendant had contracted to deliver loaves of a specified weight to any poor persons bringing a ticket from the relieving officer, and that the duty of the defendant was to return these tickets at the end of each week, together with a written statement of the number of loaves delivered by him to the paupers, whereupon he would be credited for that amount in the relieving officer's book, and the money would be paid at the time stipulated in the contract. The defendant, having delivered loaves of less than the specified weight, returned the tickets, and obtained credit in account for the loaves so delivered, but, before the time for the payment of the money arrived, the fraud was discovered :—*Held* that this was a case within the Statute against false pretences, because the defendant had been guilty of a fraudulent

(a) *Reg. v. Evans*, 6 U. C. L. J. 262 ; Bell, 187 ; 29 L. J. (M. C.) 20.

(b) *Reg. v. Hunter*, 16 W. R. 343 ; 10 Cox. 642 ; and see *Reg. v. Carter* ; *Ib.* 648.

misstatement of an antecedent fact, and had not merely sold goods to the prosecutors upon a misrepresentation of weight or quality. The Court suggested a *quære* whether a case of this latter description is within the statute:—*Held*, also that, although the defendant had obtained only credit in account, and could not therefore have been convicted of the complete offence, he might have been convicted of an attempt to obtain money, he having done all that depended upon himself towards obtaining it. (a)

A. applied to B. for a loan upon the security of a piece of land, and falsely and fraudulently represented that a house was built upon it. B. advanced the money upon A. signing an agreement for a mortgage, depositing his lease, and executing a bond as collateral security:—*Held*, that A. was properly convicted of obtaining money by false pretences. (b) Under the more recent decisions, the execution of a contract, between the same parties, does not secure from punishment the obtaining of money under false pretences in conformity with that contract. (c)

Fraudulently misrepresenting the amount of a bank note, and thereby obtaining a larger sum than its value in change, is obtaining money by false pretences, although the person deceived has the means of detection at hand, and the note is a genuine bank note. (d) A servant, whose duty it was to obtain from his master's cashier as much money as he required for the payment of dues, asked for and obtained more than he knew was necessary, and applied the surplus to his own use:—*Held*, that this was not larceny, but false pretences. (e)

(a) *Reg. v. Eagleton*, 1 U. C. L. J. 179; Dears. 515; 24 L. J. (M. C.) 158. See also *Reg. v. Sherwood*, Dears. & B. 251; 26 L. J. (M. C.) 81; *Reg. v. Lee*, L. & C. 418; 33 L. J. (M. C.) 129; *Reg. v. Ragg*, Bell, 214; 29 L. J. (M. C.) 86.

(b) *Reg. v. Burgon*, 2 U. C. L. J. 138; Dears & B. 11; 25 L. J. (M. C.) 105.

(c) See *Reg. v. Abbott*, 1 Den. 173; 2 C. & K. 630; *Reg. v. Boss*, Bell 208; 29 L. J. (M. C.) 86; *Reg. v. Meakin*, 11 Cox, 270; Arch. Cr. Pldg. 473.

(d) *Reg. v. Jessop*, 4 U. C. L. J. 167; Dears. & B. 442; 27 L. J. (M. C.) 70.

(e) *Reg. v. Thompson*, 32 L. J. (M. C.) 57; L. & C. 233.



The prisoner was convicted upon an indictment. charging him, with obtaining money and goods, by pretending that a piece of paper was a bank note, then current and worth £5. It was proved that he fraudulently passed the paper as the bank note of an existing solvent firm, knowing that the bank had stopped payment forty years before. The proceedings in bankruptcy were not produced, and a witness for the prosecution proved, in cross examination, that he was employed, by the bankruptcy commissioners, to print certain indorsements in their presence which appeared on the notes, and, without which, no holder could obtain a dividend :—*Held*, that the conviction was right. (a)

The prisoner represented to the prosecutor that a lot of land, on which he wished to borrow money, had a brick house upon it, and thus procured a loan on mortgage, when in fact the land was vacant :—*Held*, that he was properly convicted of obtaining the money under false pretences. (b)

Upon an indictment alleging that the prisoner obtained a coat, by falsely pretending that a bill of parcels of a coat of the value of 14s. 6d. of which 4s. 6d. had been paid on account, was a bill of parcels of another coat of the value of 22s., which the prisoner had had made to measure, and that 10s. only were due, it was proved that the prisoner's wife had selected the 14s. 6d coat for him, at the prosecutor's shop, subject to its fitting on his calling to try it on, and had paid 4s. 6d. on account, for which she received a bill of parcels giving credit for that amount. On the prisoner's calling to try on the coat, it was found to be too small, and he was then measured for one, which he order-

(a) *Reg. v. Dowey*, 16 W. R. 344; 37 L. J. (M. C.) 52.

(b) *Reg. v. Huppel*, 21 U. C. Q. B. 281.

ed to be made, to cost 22s. ; and on the day named for trying on that coat, he called and the coat was fitted on by the prosecutor, who had not been present on the former occasion ; and the case stated that the prisoner, on the coat being given to him, handed 10s., and the bill of parcels for the 14s. 6d. coat saying. " There is 10s. to pay," which bill the prosecutor handed to his daughter, to examine, and, upon that the prisoner put the coat under his arm, and, after the bill of parcels referred to had been handed to him with a receipt, went away. The prosecutor stated that, believing the bill of parcels to be a genuine bill, and that it referred to the 22s. coat, he parted with that coat on payment of the 10s., which otherwise, he should not have done :—*Held*, that there was evidence to go to the jury, and that the conviction was right. (a)

Where a prisoner, who had been discharged from A's service, went to the store of O. and S., and representing himself as still in the employ of A., who was a customer of O. and S., asked for goods in A's name, which were sent to A's house, where the prisoner preceded the goods, and, as soon as the clerk delivered the parcel, snatched it from him saying, " This is for me I am going in to see A." but, instead of doing so, walked out of the house, with the parcel :—*Held*, that, under the 4 & 5 Vic., c. 25, s. 45, the prisoner was rightly convicted of having obtained the goods from O. and S. under false pretences. (b)

The prisoner sold a mare to B. taking his notes for the purchase money, one of which was for \$25, and a chattel mortgage on the mare as collateral security ; after this note had matured he threatened to sue on it, and pretended that he was in a position to do so. B. then got one R. to pay the money, the prisoner promising to get the notes from a

(a) *Reg. v. Steels*, 16 W. R. 341.

(b) *Reg. v. Robinson*, 9 L. C. R. 278.

lawyer's office where he said they were, and give them up next morning. This note, however, had been sold by the prisoner some time before, to another person who afterwards sued B. upon it, and obtained judgment. The jury found that the prisoner falsely pretended, he had the \$25 note in his possession, or under his control, with the motive of inducing B. to part with his money:—*Held*, that the prisoner might be properly convicted of obtaining the \$25 by false pretences. (a) It is a sufficient false pretence, within the Statute, to pretend that certain drafts, in return for which the prisoner obtained from the prosecutor a mortgage and a promissory note, were good and would be paid, whereas, it appeared that these drafts were worthless from first to last, and were merely fictitious. (b)

It would seem that indefinite or exaggerated praise, upon a matter of indefinite opinion, cannot be made the ground of an indictment for false pretences. (c)

The prisoner induced the prosecutor to purchase a chain from him, by fraudulently representing to him that it was 15 carat gold, when, in fact, it was only of a quality a trifle better than 6 carat, knowing at the time that he was falsely representing the quality of the chain as 15 carat gold:—*Held*, that the statement that the chain was 15 carat gold, not being mere exaggerated praise, nor relating to a mere matter of opinion, but a statement as to a specific fact within the knowledge of the prisoner, was a sufficient false pretence to sustain an indictment for obtaining money under false pretences. (d)

The questions whether statements of a seller of an

(a) *Reg. v. Lee*, 23 U. C. Q. B. 340.

(b) *Reg. v. Brady*, 26 U. C. Q. B. 14, per *Draper*, C. J.

(c) *Reg. v. Goss*, Bell, 208; 29 L. J. (M. C.) 90, per *Erle*, C. J.; *Reg. v. Bryan*, Dears. & B. 265; 26 L. J. (M. C.) 84. See also *Reg. v. Watson*, Dears. & B. 348; 27 L. J. (M. C.) 18, per *Erle*, J.; *Reg. v. Levine*, 10 Cox, 374.

(d) *Reg. v. Ardley*, L. R. 1 C. C. R. 301.

article are matter of fact, or matter of opinion—statements of specific facts, or mere exaggerated praise—are for the jury. (a)

It would seem, from these and other cases, that a specific representation of quality, if known to be false, is within the Statute.

It has been held that obtaining, by false pretences, the signature of the prosecutor to an acceptance of a bill of exchange, produced to him for that purpose by the defendant, with intent to defraud, was not indictable under the repealed (Imp.) Act, 7 & 8 Geo. 4, c. 29, s. 53 (b) It would now be indictable under the 32 & 33 Vic., c. 21, s. 95.

Formerly, if on an indictment for obtaining, etc., by false pretences, it was proved that the property was obtained in such manner as to amount to larceny, the defendant was entitled to an acquittal, the misdemeanor being merged in the felony. (c)

The true meaning of this clause is, that, if the obtaining by false pretences is proved, as it is laid in the indictment, the defendant is not entitled to be acquitted of the misdemeanor, simply because the case amounts to larceny. (d)

The effect of the Statute seems to be merely to prevent the operation of that rule by which a misdemeanor merged in a felony, when the facts disclosed the latter crime. It is apprehended that a party could not be convicted under this clause, unless there was sufficient proof of an obtaining by false pretences.

Upon an indictment containing several counts for obtaining money under false pretences, the evidence went

(a) *Reg. v. Ardley*, L. R. 1 C. C. R. 304, per *Bovill*, C. J.

(b) *Reg. v. Danger*, Dears. & B. 307; 26 L. J. (M. C.) 185.

(c) But see now 32 & 33 Vic. c. 21, s. 93.

(d) See *ante* p. 79; *Reg. Bulmer*, L. & C. 476; 33 L. J. (M. C.) 171; 9 Cox 492; Arch. Cr. Pldg. 483.

to show that the defendant had, by fraudulent misrepresentations of the business he was doing in a trade, induced the prosecutor to enter into a partnership agreement, and advance £500 to the concern; but it did not appear that the trade was altogether a fiction, or that the prosecutor had repudiated the partnership. The question for the Court being, whether, upon such evidence, the jury were bound to convict the defendant:—*Held*, that he was entitled to an acquittal, as it was consistent with the evidence that the prosecutor, as partner, was interested in the money obtained. (a)

Where a defendant, on an indictment for obtaining money by false pretences, has been found “guilty of larceny,” the Court has no power, under the Con. Stats. U. C., c. 112, s. 3, to direct the verdict to be entered as one of “guilty,” without the additional words, “of larceny.” (b)

A letter, containing a false pretence, was received by the prosecutor, through the post, in the borough of C.; but it was written and posted out of the borough. In consequence of that letter, he transmitted through the post, to the writer of the first, a Post-Office order for £20, which was received out of the borough:—*Held*, that, in an indictment against the writer of the first letter, for false pretences, the venue was well laid in the borough of C. (c)

Where the venue, in an indictment for obtaining sheep by false pretences, was laid in county E., where the person was convicted, and it appeared that the sheep had been obtained by the prisoner in county M., and that he conveyed them into county E., where he was appre-

(a) *Reg. v. Watson*, 4 U. C. L. J. 73; *Deara & B.* 348; 27 L. J. (M. C.) 18.

(b) *Reg. v. Ewing*, 21 U. C. Q. B. 523.

(c) *Reg. v. Leech*, 2 U. C. L. J. 138; *Deara*, 642; 25 L. J. (M. C.) 77.

hended :—*Held*, that he had been indicted in a wrong county. (a)

It has been held that an indictment for obtaining money by false pretences must shew, on the face of it, a false pretence of an existing fact; and where the pretence averred was, that the prisoner falsely pretended that he, having done certain work, there was money “due and owing” to him for and on account of the work, parcel of a larger sum claimed by him; whereas there was not then “due and owing” to him such money, being parcel, etc. After verdict of guilty had been recorded, judgment was arrested, and the Court held that the indictment was bad, and the arrest of judgment proper, upon the ground that the false pretence of an existing fact was not sufficiently alleged, and that the averment would be proved by evidence of a wrongful overcharge, or misrepresentation of matter of law. (b)

Our form of indictment for obtaining money by false pretences does not require the pretences to be set out, but simply, that the prisoner, “by false pretences, did obtain,” etc.. It is apprehended that it will be sufficient to follow the statutory form, and that the false pretence of an existing fact need not be set out.

To sustain an indictment for obtaining, or attempting to obtain, money by false pretences, the indictment must state with certainty the pretence of a supposed existing fact.

A statement that prisoner pretended to H. P. (the manager of T.’s business) that H. P. was to give him 10s., and that T. “was going to allow him 10s. a-week, held insufficient—*Blackburn, J. and Pigott, J, dubitantibus*. (c)

One D., being a postmaster at Berlin, transmitted to

(a) *Reg. v. Stanbury*, 8 U. C. L. J. 279; L. & C. 128; 31 L. J. (M. C.) 88.

(b) *Reg. v. Oates*, 1 U. C. L. J. 135; Dears. 459; 24 L. J. (M. C.) 123.

(c) *Reg. v. Henshaw*, L. & C. 444; 33 L. J. (M. C.) 132.

defendant, at Toronto, several Post-Office orders, payable there, which defendant presented, and got cashed; but it appeared afterwards that the money thus obtained had never been received by D. for defendant, and that frauds to a large extent had been thus committed. Defendant having been convicted, upon an indictment which charged him with having unlawfully, fraudulently, and knowingly, obtained from our Lady the Queen these sums of the moneys and property of our said Lady the Queen, with intent to defraud:—*Held*, that the indictment was good—that the 56th section of the Con. Stats. Can., c. 31, was not applicable to the case, and that it was unnecessary to allege an intent to defraud any particular person, as the indictment was in the language of the Statute (a) creating the offence, and the same manner of allegation was sanctioned by c. 99, s. 29, of the Con. Stats. (b)—*Held*, also, that the indictment need not lay the money as the property of the Postmaster-General, and it was sufficient to lay it in Her Majesty. (c)

A municipality having provided some wheat for the poor, the defendant obtained an order for fifteen bushels, described as “three of golden drop, three of fife, nine of milling wheat.” Some days afterwards, he went back, and represented that the order had been accidentally destroyed, when another was given to him. He then struck out of the first order “three of golden drop, three of fife,” and, presenting both orders, obtained, in all, twenty-four bushels. The indictment charged that defendant unlawfully, fraudulently, and knowingly, by false pretences, did obtain an order from A., one of the municipality of B., requiring the delivery of certain wheat, by and from one C., and, by presenting the said

(a) Con. Stat. Can. c. 92, s. 73.

(b) *Reg. v. Dessaner*, 21 U. C. Q. B. 231.

(c) See now 32 & 33 Vic. c. 21, s. 93.

order to C., did fraudulently, knowingly, and by false pretences, procure a certain quantity of wheat, to wit, nine bushels of wheat, from the said C., of the goods and chattels of the said municipality, with intent to defraud:—*Held*, that the indictment was sufficient in substance, and not uncertain or double, but in effect charging that defendant obtained the order, and, by presenting it, obtained the wheat by false pretences. (a)

An indictment, charging that defendant, by false pretences, did obtain board of the goods and chattels of the prosecutor, was held bad, the term “board” being too general. (b)

An indictment for obtaining by false pretences goods and chattels, or a chattel of the prosecutor, not defining them or it, would be insufficient. There must be the same particularity as in larceny, that the party may know certainly what he is charged with stealing, or obtaining by false pretences. (c) The prosecutor is not bound to deliver to the defendant the particulars of the crime charged against him. (d)

An indictment, for obtaining money or goods by false pretences, must have stated whose the money was, or goods were. (e)

But the allegation of ownership is rendered unnecessary by the 32 & 33 Vic., c. 21, s. 93. By the same section, a general allegation that the party accused did the act, with intent to defraud, is sufficient, without alleging an intent to defraud any person.

An allegation in a count for obtaining a cheque, describing it “for the sum of £8 14s. 6d. of the moneys of

(a) *Reg. v. Campbell*, 18 U. C. Q. B. 413.

(b) *Reg. v. M'Quarrie*, 22 U. C. Q. B. 600.

(c) *Ib.* 601, per *Draper*, C. J.

(d) *Reg. v. Senecal*, 8 L. C. J. 286.

(e) *Reg. v. M'Donald*, 17 U. C. C. P. 638, per *A. Wilson*, J.; *Reg. v. Martin*, 8 A. & E. 481.



William Willis," sufficiently describes the ownership of the cheque, for the words "of the moneys" may be rejected. (a)

The English Statute, 9 & 10 Vic., c. 95, s. 57, is confined to the use of false instruments, and does not apply to the mere verbal assertion of authority. Therefore, where the prisoner had obtained payment of a sum, in discharge of a debt and costs, from a defendant, (who had been previously duly served with a summons in the County Court) by pretending that he was an officer of, and authorised by, the Court to receive it, it was held that the offence was not made out. (b)

The above clause of the English Statute is, in substance, the same as the 181st clause of our Division Court Act, Con. Stats. U. C., c. 19, so that the decision is in point on the construction of our statute. In another case, on the same clause of the Statute, the prisoner was indicted for acting, and professing to act, under a false colour and pretence of County Court process, and it was proved that the prisoner, being a creditor of R., sent him a nonsensical letter, headed with the Royal Arms, and purporting to be signed by the Clerk of a County Court, threatening County Court proceedings. He, subsequently told R.'s wife that he had ordered the County Court to send the letter, upon which she paid the debt; and, whilst making out the receipt, he made demand of her for the County Court expenses:—*Held*, that these facts constituted felony, within the meaning of the section, and that the conviction must be supported. (c)

Where A. delivered to B. a document requiring him to produce accounts, etc., at a trial in a County Court, intituled of the Court, and giving the names of Plaintiff

(a) *Reg. v. Godfrey*, 4 U. C. L. J. 167; *Dears. & B. C. C.* 426.

(b) *Reg. v. Myott*, 1 U. C. L. J. 35; 6 Cox, C. C. 406.

(c) *Reg. v. Evans*, 3 U. C. L. J. 119; *Dears. & B.* 236; 26 L. J. (M. C.) 92.

and Defendant, with a statement, in the margin, of the amount of the sum claimed, no such cause really existing: on an indictment against A., for feloniously causing to be delivered to B., a paper purporting to be a copy of a certain process of the County Court of L.:—*Held*, that the document above mentioned was a notice to produce documents, etc., between party and party, and not a process of the Court, nor did it purport to be so. (a)

B. being indebted to A., A. obtained a blank form for Plaintiff's instructions to issue County Court summons. This he filled up with particulars of the names and addresses of himself and B., as plaintiff and defendant, and of the nature and amount of the claim, and, without any authority, signed it in the name of the Registrar, endorsing also a notice, signed also by A. in the name of the Registrar, and without his authority, that unless the amount claimed were paid by B. on a certain day, an execution warrant would issue against him. This paper he delivered to B., with intent thereby to obtain payment of his debt:—*Held*, (b) that this was "an acting, or professing to act, under false colour, and pretence of process of the County Court," within the meaning of 9 & 10 Vic., c. 95, s. 57. (c)

Having treated specifically of the offences of larceny, embezzlement, and the obtaining of money by false pretences, we proceed to point out the distinctions between them. It is of the essence of the offence of larceny that the property be taken against the *will* of the owner. (d) If taken by the consent of the owner, for instance, if he *intends* to part with the property, no larceny will be committed.

(a) *Reg. v. Castle*, 4 U. C. L. J. 73; *Deara. & B.* 363; 27 L. J. (M. C.) 70.

(b) Affirming *Reg. v. Evans*, *supra*.

(c) *Reg. v. Richmond*, 5 U. C. L. J. 237; Bell 142.

(d) *Reg. v. Prince*, L. R. 1 C. C. R. 154, per *Bovill*, C. J.

In false pretences the property is obtained with the consent of the owner, the latter intending to part with his property. (a) The crime is constituted by the pretence that something has taken place, which, in fact, has not taken place. (b) It, therefore, necessarily differs from larceny, in the fact the property in the chattel passes to the person obtaining it, and it may, though perhaps not necessarily, differ from larceny in this, that the owner is induced to voluntarily part with his property, in consequence of some false pretence of an existing fact, made by the person obtaining the chattel. But the crime of obtaining money by false pretences is similar to larceny in this, that, in both offences, there must be an intention to deprive the owner wholly of his property in the chattel. (c)

Embezzlement consists in obtaining the lawful possession of goods, etc., without fraud or any false pretence, as upon a contract, or with the consent of the owner, in the ordinary course of duty or employment, or independently of such employment, and subsequently converting the goods, with a felonious intent to deprive the owner of his property therein. It differs from larceny in this, that the possession of the goods, etc., is lawfully obtained, in the first instance without the ingredient of trespass, and the conversion takes place while the privity of contract exists between the parties. The acquisition of lawful possession, in the first instance, is the constituent feature of this offence, and, according to the doctrines of the common law, no larceny could be committed by a bailee or other person whose original title was lawful, until the privity of contract was determined. A carrier could not be convicted of larceny unless he

(a) See *White v. Garden*, 10 C. B. 927, per *Talfourd*, J.

(b) *Reg. v. M'Grath*, L. R. 1 C. C. R. 209, per *Kelly*, C. B.

(c) See *Reg. v. Kilham*, L. R. 1 C. C. R. 261, ante p. 337.

“broke bulk,” and the reason was that the act of “breaking bulk” was an act of trespass in the carrier, by which the privity of contract was determined. Now, however, the carrier is guilty of larceny, although he do not break bulk or otherwise determine the bailment. (a)

The distinction between larceny and embezzlement may be illustrated by the case of a clerk or servant, whose duty it is to receive money for, or on account of, his master. An appropriation before the money, etc., comes into the actual possession of the master, as if a clerk in a shop, on receiving money, puts it into his pocket before putting it into the till, would be embezzlement. (b) But if the money is put in the till, or otherwise becomes actually in the master's possession before appropriation, and is, in the act of appropriation, taken out of the possession of the master, this is larceny at common law.

But these distinctions are not of such practical importance as formerly, for, in either of the above cases, whether the indictment were framed for larceny or embezzlement, the defendant might be convicted of the offence proved in evidence, (c) and a person indicted for obtaining money by false pretences may be convicted of that offence, although the facts proved also shew a larceny. (d)

*Receiving Stolen Goods.*—This offence was punishable at common law only as a misdemeanor, even when the principal had been found guilty of felony in stealing the goods, (e) and the mere receipt of stolen goods did not, at common law, constitute the receiver an accessory, but

(a) See 32 & 33 Vic. c. 21, s. 3.

(b) *R. v. Bull*, 2 Leach, 841; *R. v. Bayley*, 2 Leach, 835; *R. v. Sullens*, 1 Mood. C. C. 129; *R. v. Walsh*, R. & R. 218; *Reg. v. Masters*, 1 Den. 332; 2 C. & K. 930; 18 L. J. (M. C.) 2.

(c) See 32 & 33 Vic. c. 21, s. 74.

(d) 32 & 33 Vic. c. 21, s. 93.

(e) 2 Russ. Cr. 542.

was a misdemeanor, punishable by fine and imprisonment, (a) unless he likewise received and harboured the thief. (b)

There must be a stealing of goods, and the stealing must be a *crime*, either at common law or by statute, before a party is liable to be convicted of receiving. (c) Accordingly, it has been held in England, that where A. and B. were in partnership, and B. stole the partnership goods, and disposed of them to the prisoner, who received them, knowing them to have been so stolen, a conviction of the prisoner, under the 24 & 25 Vic., c. 96, s. 91, could not be sustained, for the stealing was not a crime, either at common law or under the said Act, although it was a felony, within the 31 & 32 Vic., c. 116, s. 1. (d)

This latter statute renders the stealing of partnership property felony, and is identical with the 32 & 33 Vic., c. 21, s. 38, but it is a distinct Act from the 24 & 25 Vic., c. 96, and the ground of the decision in the above case was, that the stealing of partnership property was not felony, by virtue of the 24 & 25 Vic., c. 96, upon which the indictment was framed. Section 91 uses the words "by virtue of *this* Act," and the stealing was not a crime by virtue of this latter Act, but by virtue of the former; consequently the offence was excluded by the express language of the statute. It is apprehended that with us, notwithstanding this case, a person may be convicted under the 32 & 33 Vic., c. 21, s. 100, for receiving goods which have been stolen, or converted by a partner, in violation of the provisions of s. 38, for the stealing would be a crime "by virtue of *this* Act," within the language of s. 100.

(a) 2 Russ. Cr. 554.

(b) *Reg. v. Smith*, L. R. 1 C. C. R. 270, per *Bovill*, C. J.

(c) *Reg. v. Smith*, L. R. 1 C. C. R. 266; 39 L. J. (M. C.) 112.

(d) *Ib.*

A conviction of the principal for embezzlement is sufficient to warrant a conviction of the receiver, by virtue of the express words of s. 100 of the 32 & 33 Vic., c. 21. (a)

It is quite clear that the goods must be stolen, or, at all events, the stealing, taking, extorting, embezzling, and otherwise disposing thereof, must amount to felony, either at common law or by virtue of the statute.

Where four thieves stole goods from the custody of a railway company, and afterwards sent them in a parcel, by the same company's line, addressed to the prisoner. During the transit the theft was discovered, and on the arrival of the parcel at the station for its delivery, a policeman in the employ of the company opened it, and then returned it to the porter, whose duty it was to deliver it, with instructions to keep it until further notice. On the following day the policeman directed the porter to take the parcel to its address, where it was received by the prisoner, who was afterwards convicted of receiving the goods, knowing them to be stolen. Upon an indictment, which laid the property in the goods in the railway company :—*Held*, (b) that the goods had got back into the possession of the owner, so as to be no longer stolen goods, and that the conviction, on that ground, was wrong. (c)

There must be a receipt of *stolen* goods. Thus where stolen goods were found in the pocket of the thief by the owner, who sent for a policeman. The policeman took the goods, and the three went together towards the shop of A., where the thief had previously sold stolen goods. When near it, the policeman gave back the goods to the

(a) *Reg. v. Frampton*, Dears. & B. 585; 27 L. J. (M. C.) 229; Arch. Cr. Pldg. 436.

(b) By *Martin*, B., and *Keating* and *Lush*, JJ.; *dissentientibus*, *Erle*, C. J., and *Mellor*, J.

(c) *Reg. v. Schmidt*, L. R. 1 C. C. R. 15; 35 L. J. (M. C.) 94.

thief, who was sent, by the owner, to sell them where he had sold the others. The thief then went alone into A's shop and sold the goods to him, and returned with the proceeds to the owner:—*Held*, that, under these circumstances, A. could not be convicted of receiving stolen goods, for when *the goods* came to the prisoner's hands, they were not *stolen* goods. (a)

On an indictment for stealing and receiving a mixture, it appeared that the thief had stolen two sorts of grain, and then mixed them, and sold them to the prisoner:—*Held*, that the latter (the receiver) could not be convicted on such, an indictment, for the indictment charged a receiving of a mixture, which had been stolen, knowing it, *i. e.* the *mixture*, to have been stolen but the only evidence shewed that pure oats and pure peas were stolen, and afterwards mixed and sold to the prisoner—so that the one prisoner did not steal a mixture, and the other did not receive, as the indictment alleged, a *mixture* which had been stolen, for the mixture had not been stolen. (b)

By the old law, if two defendants were indicted jointly for receiving, a joint act of receiving must have been proved in order to convict both. (c)

Now the 32 & 33 Vic., c. 21, s. 103, extends to cases, where, upon an indictment for a joint receipt, it is proved that each of the prisoners separately received the whole of the stolen property at different times, the one receipt subsequent to the other; and it makes no difference whether the receipt was direct from the thief, or from an intermediate person. There is no distinction between separate receipts of the whole, and of part of the property (d); and, under s. 102, there is no distinction between

(a) *Reg. v. Dolan*, 1 U. C. L. J. 55; *Dears.* 463; 24 L. J. (M. C.) 59.

(b) *Reg. v. Robinson*, 1 U. C. L. J. N. S. 53; 4 F. & F. 43.

(c) *Reg. v. Messingham*, 1 Mood. C. C. 257.

(d) *Reg. v. Reardon*, L. R. 1 C. C. R. 31; 35 L. J. (M. C.) 171.

separate receipts at the same time, and separate receipts at different times. (a)

The goods stolen must be received by the defendant, and though there be proof of a criminal intent to receive, and a knowledge that the goods were stolen, if the *exclusive* possession still remains in the thief, a conviction for receiving cannot be sustained. (b) It is also necessary that the defendant should, at the time of receiving the goods, know that they were stolen. (c)

Where a husband and wife are indicted for receiving, it is proper that the jury should be asked whether the wife received the goods, either from or in the presence of her husband, and where the question was not put, and both husband and wife were convicted, the Court quashed the conviction of the wife. (d)

Where, on a joint indictment against husband and wife for receiving goods with a guilty knowledge, the indictment found specially that the wife did so receive, and that the husband "adopted the wife's receipt":—*Held*, that the latter words were not equivalent to a verdict of guilty, against the husband. (e)

Upon an indictment for feloniously receiving a hat and a watch, it was proved that, in consequence of information received from L. (the thief), a constable went to a room in a lodging house, where the prisoner slept, and, in a box in that room, found the stolen hat. The prisoner produced it at once, and admitted that L. had brought it there, but denied any knowledge of the watch. On the following day, he was taken into custody, and after he had left the house, he told the constable that he

(a) *Reg. v. Reardon*, L. R. 1 C. C. R. 32, per *Pollock*, C. B.

(b) *R. v. Wiley*, 2 Den. 37; 20 L. J. (M. C.) 4; Arch. Cr. Pldg. 436.

(c) *Ib.* 437.

(d) *Reg. v. Wardroper*, 6 U. C. L. J. 262; 1 Bell, C. C. 249. See also *Reg. v. Archer*, 1 Mood. C. C. 143.

(e) *Reg. v. Dring*, 4 U. C. L. J. 23; Dears. & B. 329.



knew where the watch was, but did not like to say anything about it before the people in the house. The watch was not found at the first place, to which he took the constable, but he afterwards sent a boy for it, and the boy having brought it to him, he gave it to the constable:—*Held*, that there was sufficient evidence to go to the jury of a felonious receiving. (a)

On an indictment for feloniously receiving goods, knowing them to have been stolen, it is unsafe to convict a party as receiver on the evidence of the thief, unless it is confirmed, for otherwise it would be in the power of a thief from malice or revenge, to lay a crime on any one against whom he had a grudge. (b)

The (Imp.) 32 & 33 Vic., c. 99, s. 11, enacts that, when any person, who has been previously convicted of certain specified offences, is found in possession of stolen goods, evidence of such previous conviction shall be admissible to shew his knowledge of the goods being stolen. Service of a notice under this Act, and proof of a previous conviction, does not relieve the prosecution from the necessity of proving that the goods have been stolen. (c)

The writer is not aware of any enactment, in Canada, similar to the above.

*Forgery*.—This offence is defined as the fraudulent making or alteration of a writing to the prejudice of another man's right, (d) or as a false making, or making *malo animo*, of any written instrument, for the purpose of fraud and deceit. (e)

Forgery takes a very wide range, and includes within

(a) *Reg. v. Hobson*, 1 U. C. L. J. 36; Dears. C. C. 400.

(b) *Reg. v. Robinson*, 1 U. C. L. J. N. S. 53; 4 F. & F. 43.

(c) *Reg. v. Davis*, L. R. 1 C. C. R. 272.

(d) *Re Trueman B. Smith*, 4 U. C. P. R. 216, per A. Wilson, J.; and see *Reg. v. Smith*, 1 Dears. & B. 566.

(e) *Hall v. Carty*, 1 James, 385, per Bliss, J.

it fraudulent acts and fabrications, of various descriptions and classes, effected in the numberless ways to which the evil ingenuity of crime can resort. (a) But it is said that the offence consists in the false making of an instrument purporting to be that which it is not, and not the making of an instrument purporting to be that which it really is, but which contains false statements; and that telling a lie does not become a forgery, because it is reduced to writing. (b)

The instrument must carry, on the face of it, the semblance of that for which it is counterfeited, and not be illegal in its very frame, though it is immaterial whether, if genuine, it would be of validity or not. (c)

On the above principles, the forging or uttering, in this country, a writing purporting to be a bank note, issued by a banking company in the State of Maine, amounts to the crime of forgery, though it is not proved that the company had power, by charter, to issue notes of that description; (d) it being shewn that the note carried on its face the semblance of a bank note, issued by a company in the State of Maine, and there being nothing in its frame to shew it illegal, even though there was no charter or Act of Parliament authorizing the issue of such notes. Even if the illegality were a defence, the *onus* of proving it would lie on the prisoner. (e) It is no objection that the note is payable in the State of Maine. (f)

A person, having an order for delivery of wheat for the support of poor persons in a municipality, is guilty of forgery, if he materially alters the order, so as to increase

(a) *Hall v. Carty*, 1 James, 385, per *Bliss*, J.  
 (b) *Ex parte, E. S. Lamirande*, 10 L. C. J., 290, per *Drummond*, J.  
 (c) *Reg. v. Brown*, 3 Allen, 15 per *Carter*, C. J.  
 (d) *Reg. v. Brown*, 3 Allen, 13.  
 (e) *Ib.* 15, per *Carter*, C. J.  
 (f) *Ib.*

the quantity of wheat which is obtainable thereunder, with intent to defraud. (a)

So it is forgery to execute a deed in the name of, and as representing, another person, with intent to defraud, even though the prisoner has a power of attorney from such person, but fraudulently conceals the fact of his being only such attorney, and assumes to be principal. (b)

It is forgery, within the meaning of the 32 & 33 Vic., c. 19. s. 23, to make a deed fraudulently, with a false date, when the date is a material part of the deed, although the deed is, in fact, made and executed by and between the persons by and between whom it purports to be made and executed. (c)

Every instrument, which fraudulently purports to be that which it is not, is a forgery, whether the falseness of the instrument consists in the fact that it is made in a false name, or that the pretended date, when that is a material portion of the deed, is not the date at which the deed was, in fact, executed. (d)

Where an instrument professes to be executed at a date different from that at which it really was executed, and the false date is material to the operation of the deed, if the false date is inserted knowingly, and with a fraudulent intent, it is a forgery at common law. (e)

The notion of forgery doth not so much consist in the counterfeiting of a man's hand and seal, as in the endeavouring to give an appearance of truth to a mere deceit and falsity, and either to impose that upon the world as the solemn act of another, which he is in no way privy to, or, at least, to make a man's own act appear to have been done at a time when it was not done, and, by force

(a) *Reg. v. Campbell*, 18 U. C. Q. B. 416, per *Robinson*, C. J.

(b) *Reg. v. Gould*, 20 U. C. C. P. 159, per *Gwynne*, J.

(c) *Reg. v. Ritson*, L. R. 1 C. C. R. 200; 39 L. J. (M. C.) 10.

(d) *Ib.* 203, per *Kelly*, C. B.

(e) *Ib.* 204, per *Blackburn*, J.

of such a falsity, to give it an operation which, in truth and justice, it ought not to have. (a)

It was the duty of the prisoner, a railway station-master, to pay B. for collecting and delivering parcels; and the company provided a form in which the charges were entered by the prisoner under the heads of "Delivery" and "Collecting" respectively. The prisoner having falsely told B. that the company would not pay for delivering, but only for collecting, continued to charge the company for collecting and delivering; and in order to furnish a voucher, after paying B.'s servant the sum entered in the form for collecting, and obtaining his receipt, in writing, for that amount, without either his or B.'s knowledge, put a receipt stamp under this servant's name, and put therein, in figures, a larger sum than he had paid, being the aggregate for collecting and delivering:—*Held*, that the prisoner was guilty of forgery. (b)

Where, on an indictment for forgery, it appeared that a promissory note had been drawn by the prisoner, payable, two months after date, to the order of one J. S., and afterwards endorsed by said S.: the prisoner then altered the note, by making it payable three months after date, and discounted it at the Bank of British North America, in London, Ontario. The jury having convicted him of forgery, on motion for a new trial, on the ground that the forgery or uttering, if any, was a forgery of or the uttering of a forged endorsement, the note having been made by the prisoner himself, and that there was no legal evidence of an intent to defraud:—*Held*, that the altering of the note, while it was in his own possession, after endorsement, was a forgery of a note, and not of an endorsement, and that the passing of the note to a third

(a) *Reg. v. Bitson*, L. R. 1 C. C. R. 204, per *Blackburn*, J.

(b) *Reg. v. Griffiths*, 4 U. C. L. J. 240; *Deara & B.* 548; 27 L. J. (M. C.) 205.

party, who was thereby defrauded, was sufficient evidence of an intent to defraud. (a)

The instrument must be made with intent to defraud, which is the chief ingredient of the offence. (b)

On an indictment for forgery, there must be evidence of an intent to defraud, (c) and the writing of a signature in sport, without any intention to defraud, or pass it off as genuine, is not a forgery. (d)

A man may draw a promissory note for any sum he pleases, and in favour of any person, and payable to him, or to his order, or to bearer, and on demand, or at any time after date, at any place, and, so long as it remains simply as *his own* promissory note, in his own possession, and charging no other person but himself with liability, he may alter it, at his own free will, in all or any particulars. But that right of alteration ceases when another person becomes interested in the note, either by acquiring it as his own property, or by becoming a party to or responsible for its payment; and an alteration then made, prejudicial to any such person, and *under circumstances which afford ground for inferring an intention to defraud*, is a criminal act. It would seem that, even after another person becomes a party to the note—if, for instance, the note was made by the prisoner, and endorsed by another, but still retained in the hands of the prisoner, and not uttered as genuine, there would be nothing to establish the intention to defraud, and the prisoner could not be convicted of forgery. (e)

Under the 32 & 33 Vic., c. 19, s. 51, the indictment need not allege an intent to defraud any particular per-

(a) *Reg. v. Craig*, 7 U. C. C. P. 239.

(b) 2 Russ. Cr. 774.

(c) *Reg. v. Craig*, *supra*, 244, per *Draper*, C. J. ; *Reg. v. Dunlop*, 15 U. C. Q. B. 119, per *Robinson*, C. J.

(d) *Ib.* 119, per *Robinson*, C. J.

(e) *Reg. v. Craig*, 7 U. C. C. P. 241, per *Draper*, C. J.

son. (a) Nor is it necessary to prove an intent to defraud any particular person, but it is sufficient to prove that the party accused did the act charged, with intent to defraud. (b)

It is also immaterial whether any person is actually defrauded by the forgery. (c) If, from circumstances, the jury can presume that it was the defendant's intention to defraud, it is sufficient to satisfy the allegation in the indictment, even though, from circumstances unknown to the defendant, he could not, in fact, defraud the prosecutor. (d)

The making of a false instrument is forgery, though it may be directed by statute that such instrument shall be in a certain form, which, in the instrument in question, may not have been complied with, the Statute not making the informal instrument absolutely void, but it being available for some purposes. (e) Upon the same principle, a man may be convicted of forging an unstamped instrument, though such instrument can have no operation at law.

A prisoner was convicted of forging an unstamped bill, which, under 23 Geo. 3, c. 58, s. 11, it was declared should not be pleaded, or be given in evidence, or admitted in any Court to be good, or available in law, unless stamped. The conviction was held good, as the words of the Act only meant the bill should not be made use of to recover the debt; and, besides, *the holder was authorized* to get it stamped after it was made (f)

If the instrument forged, on the face of it, is such as

(a) See *Reg. v. Hathaway*, 8 L. C. J. 285; *Reg. v. Carson*, 14 U. C. C. P. 309.

(b) 32 & 33 Vic. c. 19, s. 51.

(c) *R. v. Crooke*, 2 Str. 901; *R. v. Goate*, 1 Ld. Raym, 737.

(d) *R. v. Holden*, R. & R. 154; *R. v. Marcus*, 2 C. & K. 356; *R. v. Hoatson*, *ib.* 777.

(e) *Rex v. Lyons*, Russ. & Ry. 255.

(f) *Rex v. Hawkeswood*, 1 Leach, 257; *Rex v. Lee*, *ib.* 258 n.

would be valid, provided it had a proper stamp, the offence of forgery is complete. (a)

It seems that an indictment for forging a note or agreement, which is declared by law to be wholly void, cannot be maintained, if the instrument, on its face, affords evidence that it comes within the Statute declaring it void. (b)

A false letter of recommendation, through the uttering of which to a chief-constable the prisoner obtained a situation as constable, is the subject of forgery at common law. (c)

But a forgery must be of some document or writing; therefore, the painting of an artist's name in the corner of a picture, with the intention to pass it off as the original production of that artist, is not a forgery. (d)

An agreement in the following form:—

“GLANFORD, Jany. 29, 1864.

I, John Hostine, do agree to William Carson, of Warstead Plymp, the full rite and privilege of all the white oke and elm and hickory lying and standing on Lot 26, south part, on the third concession of Plymp, for the sum of thirty dollars now paid to Hostine by Carson, the receipt whereof is hereby by me acknowledged.

JOHN HOSTINE.”

may be considered as a contract or agreement for the sale of timber, and parol evidence, of the surrounding circumstances, at the time it was written, would be admissible to explain it; and, at all events, should it fail as an agreement, it is clearly a receipt for the payment of money within the Con. Stats. Can., c. 94, s. 9. (e)

(a) *Taylor v. Golding*, 28 U. C. Q. B. 201, per *Richards*, C. J.

(b) *Taylor v. Golding*, 28 U. C. Q. B. 202, per *Richards*, C. J.

(c) *Reg. v. Moah*, 4 U. C. L. J. 240; *Dears. & B.* 550; 27 L. J. (M. C.) 204.

(d) *Reg. v. Closs*, 4 U. C. L. J. 98; 1 *Dears. & B.* 460.

(e) *Reg. v. Carson*, 14 U. C. C. P. 309.

The prisoner was secretary of a friendly society, called the Ancient Order of Foresters, having branches in various towns. A member of this society, having paid up all his dues, wished to obtain a "clearance," or certificate that he had paid all his dues, in order that he might be entitled to membership in a branch of the society in another town. The prisoner, having received the dues and fees for the clearance, neglected to pay them over to the proper officer, and forged the signature of the latter to a clearance:—*Held*, that the clearance was not an acquittance or receipt for money within the corresponding English section of the 32 & 33 Vic., c. 19, s. 26 (a)

The prisoner was indicted under the 24 & 25 Vic., c. 98, s. 24, for feloniously making, by procuration, in the name of one A., a security for money, to wit, £417 13s, without lawful authority or excuse, with intent to defraud. The document forming the subject of the indictment was in the following form:—

" THORNTON, October, 1867.

Received of the South Lancashire Building Society the sum of four hundred and seventeen pounds 13s. on account of my share, No. 8071.

p. p. SUSY AMBLER.

" £417 13s.

WM. KAY."

*Held*, that this document, though in form a mere receipt, given by a depositor to the Building Society, might properly be described in an indictment as a "warrant," "authority," or "request," for the payment of money, if, by the custom of the society, such receipts were, in fact, treated as warrants, authorities, and requests, for the payment of money. (b)

(a) *Reg. v. French*, L. R. 1 C. C. R. 217; 39 L. J. (M. C.) 58.

(b) *Reg. v. Kay*, L. R. 1 C. C. R. 257; 39 L. J. (M. C.) 118.



The 16th section of this Statute, which is somewhat analogous to the 32 & 33 Vic., c. 19, ss. 19 and 20, extends to the engraving, in England, without authority, of notes purporting to be notes of a banking company, carrying on business in Scotland only, notwithstanding s. 65 enacts that nothing in the Act contained shall extend to Scotland. (a)

Upon an indictment, under 1 Wm., 4 c. 66., s. 18, for engraving upon a plate part of a promissory note, purporting to be part of the note of a banking company, it was proved that the prisoner, having cut out the centre of a note of the British Linen Banking Company, on which the whole promissory note was written, had procured to be engraved upon a plate, merely the Royal Arms of Scotland and the Britannia which formed part of the ornamental border, but placed upon the plate in the same manner, as they are found in a complete note of the company :—*Held*, that the plate so engraved satisfied the words of the section. That the ornamental border of such a note is part of the note within the section, as “note” is there used in the popular sense. That, in order to ascertain whether that which was engraved purported, within the section, to be part of a note, extrinsic evidence was admissible to the jury, and they might compare it with a genuine note of the company. (b)

An indorsement, “per procuration J.S.,” signed in the defendant’s own name, was held on the repealed Statute, 11 Geo., 4 and 1 Wm. 4, c. 66, s. 3, not to be a forgery, though the defendant falsely alleged that he had authority from J. S. to indorse (c)

But an indorsement, of the above description, will now be felony within the 31 & 32 Vic., c. 19, s. 27.

(a) *Reg. v. Brackenridge*, L. R. 1 C. C. R. 133; 37 L. J. (M. C.) 86.

(b) *Reg. v. Keith*, 1 U. C. L. J. 136; Dears. 486; 24 L. J. (M. C.) 110.

(c) *Reg. v. White*, 1 Den. 208; 2 C. & K. 404; Arch. Cr. Pldg. 579.

So, by s. 47 of this Statute, the forgery of an instrument in this country payable abroad, or the uttering of an instrument in this country, forged, and payable abroad, is made an offence within the meaning of the Act. (a)

When a prisoner, being pressed for payment of a debt, obtained further time to pay, by giving, as security, an I O U, in the following form :—

“ NOVEMBER 21st, 1870.

“ I O U thirty-five pounds (£35).

“ ARTHUR CHAMBERS.

“ GEORGE WICKHAM.”

and purporting to be signed by the prisoner, and another whose signature was forged by the prisoner :—*Held*, that this was an “ undertaking for the payment of money ” within the (24 & 25 Vic., c. 98, s. 23), corresponding English section of the 32 & 33 Vic., c. 19, s. 26. (b)

There being a consideration for the I O U, the fact that it did not appear was of no consequence; for the consideration of a guarantee need not be shown on its face. (c)

The following instrument was held to be a promissory note for the payment of money within s. 3, of the 10 & 11 Vic., c. 9 :—

“ The President, Directors and Co. of the Montreal Bank promise to pay five dollars, on demand, to W. Martin, or bearer :—

“ A. SIMPSON, *Cashier*,

“ WM. GANN, *Pres.*

“ MONTREAL, June 1, 1853.

(a) See *Reg. v. Kirkwood*, 1 Mood. C. C. 311.

(b) *Reg. v. Chambers*, L. R. 1 C. C. R. 341.

(c) *Ib.* See 26 Vic. c. 45.

for a forged paper, purporting to be a bank note, is a promissory note within the meaning of the statute, and it is equally so if there is no such bank, as that named, the bank intended being erroneously described in the instrument. (a)

A country bank note for the payment of one guinea, "in cash or Bank of England notes," was holden not to be "a promissory note for the payment of money" within, the 2 Geo. 2, c. 25, for it was necessary that such a note should be for the payment of money only (b); such a case is now provided for by the 32 & 33 Vic., c. 19, s. 15.

Under s. 26, the forgery of a request for the payment of money is made felony, though it was formerly no offence. (c)

A forged magistrate's order for a reward for apprehending a vagrant, which appeared upon the face of it to be defective, as not being under seal or directed to the constable, etc., was holden not to be within the former statute; for, without these requisites, it was nothing more than the order of a mere individual, which the treasurer was not bound to obey; (d) such orders would be authorities or requests within the above section.

An instrument in the following form.

\$3.50.

"CARICK, April, 10, 1868.

"JOHN MCLEAN, tailor, please give Mr. A. Steel to the amount of three dollars and fifty cents, and by doing, you will oblige me,

(Signed) ANGUS MCPHAIL.

(a) *Reg. v. M'Donald*, 12 U. C. Q. B. 543.

(b) *R. v. Wilcock*, 2 Russ. 498; Arch. Cr. Pldg. 579.

(c) See *Reg. v. Thorn*, 2 Mood. C. C. 210; C. & Mar. 206.

(d) *R. v. Rushworth*, R. & R. 317; Arch. Cr. Pldg. 583.

is an order for the payment of money, and not a mere request. (a) But an instrument as follows:—

“ RENFREW, June 13, 1860.

“ MR. MCKAY,—Sir, would you be good enough as for to let me have the loan of \$10 for one week or so, and send it by the bearer immediately, and much oblige your most humble servant,

(Sgd.) J. ALMIRAS, p. p.

is not an order for the payment of money, within the Con. Stats. Can. c. 94. (b)

“ MR. WARREN,—Please let the bearer, William Tuke, have the amount of ten pounds, and you will oblige me,

“ B. B. MITCHELL,”

is an order for the payment of money, within this Statute, and not a mere request; (c) but it would not be a warrant for the payment of money, within the meaning of the Statute. (d) The true criterion as to the instrument being an order or not, is whether the person, to whom it is directed, could recover the amount on payment. (e)

A writing not addressed to a particular person by name, or to anyone, may be an order for the payment of money, within the statute, if it be shewn by evidence that it was intended for such person, or for whom it was intended. (f)

Where the order was for \$15, in favour of “bearer or R. R.” and purported to be signed by one “B,” and the

(a) *Reg. v. Steel*, 13 U. C. C. P. 619.

(b) *Reg. v. Reopelle*, 20 U. C. Q. B. 260.

(c) *Reg. v. Tuke*, 17 U. C. Q. B. 296.

(d) *Ib.* 298, per *Robinson*, C. J.

(e) *Ib.* 299, per *Robinson*, C. J.; *Reg. v. Carter*, 1 Cox, C. C. 172; *Ib.* 241; *Reg. v. Dawson*, 3 Cox, C. C. 220.

(f) *Reg. v. Parker*, 15 U. C. C. P. 15; *Reg. v. Snelling*, 6 Cox, 230; 1 Dears. 219.

prisoner in person presented it to M., representing himself to be the payee and a creditor of "B":—*Held*, that it might fairly be inferred to be intended for M., and a conviction for forgery was sustained. (a)

An indictment will not lie for forging or altering the Assessment Roll for a township, deposited with the clerk. (b) This would probably now be an offence within the 32 & 33 Vic., c. 19.

An indictment for forging a note must allege that the note was forged.

The defendant was convicted, at the Quarter Sessions, upon an indictment, charging that he, feloniously, did offer, dispose of, and put off a certain promissory note, purporting to be made by one F., for the sum of £4 10s., with intent to defraud, he, the said defendant, at the time he so uttered and published the said note, as aforesaid, then and there, well knowing the same to be forged. It appeared that some boys had been amusing themselves with writing promissory notes, and imitating persons' signatures, and among them was one with F.'s name. The papers were put in the fire, but one of them was carried up the chimney by the draft, and fell in the street, where it was picked up by the defendant. The latter did not know by whom, or with what intent, it had been made, though he suspected it was not genuine. A person, who was with him at the time, said he thought it was not genuine, and advised him to destroy it; but defendant kept it, and afterwards passed it off, telling the person who took it that it was good:—*Held*, that, upon these facts, the defendant was guilty of a felonious uttering; but the conviction was quashed, for the indictment was

(a) *Reg. v. Parker*, 15 U. C. C. P. 15; *Reg. v. Snelling*, 6 Cox. 230; 1 Dears. 219.

(b) *Reg. v. Preston*, 21 U. C. Q. B. 86.

defective, in not stating expressly that the note was forged, or that the defendant uttered it as true. (a)

Until the Provincial Statute, 9 Vic., c. 3, the old rule of the criminal law of England prevailed, that the party, by whom a forged instrument purported to be signed, was not competent to prove the signature to be forged, and any one who might, by possibility, receive the remotest advantage from the verdict was equally excluded. But the objection was founded on the ground of interest, and, if the witness were divested of such interest he became competent. (b)

The 10 & 11 Vic., c. 9, re-enacted the provisions of the 9 Vic., c. 3, and the 16 Vic., c. 19, Con. Stats. U. C., c. 32, removed the incapacity of crime or interest. This latter Statute did not supersede the former, and both are founded on the same principle, namely, to prevent the exclusion of witnesses, on the ground of interest in the subject matter of enquiry, the first being applicable to enquiries relative to forgery, the latter, general, and also removing the disqualification attached to a conviction for crime. (c)

The 32 & 33 Vic., c. 19, s. 54 and c. 29, s. 62, now embody all the provisions of the former enactments on these points.

Where the prisoner was indicted for forging an order for the delivery of goods, and on the trial the only witnesses examined were the person whose name was forged and the person to whom the order was addressed, and who delivered the goods thereon, and, there being no corroborative evidence, it was held, that, under the proviso in the 10 & 11 Vic., c. 9, s. 21, there was not sufficient evidence to support a conviction. (d)

(a) *Reg. v. Dunlop*, 15 U. C. Q. B. 118.

(b) *Reg. v. Giles*, 6 U. C. C. P. 86, per *Draper*, C. J.

(c) *Ib.* 86, per *Draper*, C. J.

(d) *Reg. v. Giles*, 6 U. C. C. P. 84. As to what is sufficient corroboration, see *Reg. v. M'Donald*, 31 U. C. Q. B. 337.

The offence of forgery is not triable at the Quarter Sessions. (a)

Great care was formerly requisite in describing the instrument in an indictment for forgery, but now it is sufficient to describe the same by any name or designation, by which the same may be usually known, or by the purport thereof, without setting out any copy or *fac simile* thereof, or otherwise describing the same or the value thereof. (b)

It is not necessary, in an indictment for forgery, to allege an intent to defraud any particular person, but it is sufficient to allege that the party accused did the act with intent to defraud (c)

Where goods were obtained by false pretences, through the medium of a forged order, the uttering of which was felony, the indictment must formerly have been for the felony, otherwise an acquittal would have been directed on the ground that the misdemeanor was merged, (d)

In an indictment for forging a receipt, it must be alleged that such receipt was either for money or goods, etc., as mentioned in the Con. Stats. Can., c. 94, s. 9. (e)

Where the instrument is set out in *hæc verba*, in an indictment for forgery, the description of its legal character is surplusage, and unnecessary. (f)

Where an objection was taken to an indictment for forgery, that it concluded *contra formam statuti*, and that there was nothing to shew that the offence was against any Statute:—*Held*, that this averment was of no importance, for, if the offence was one against the Statute, it was sufficiently proven, and, if not against the Statute,

(a) *Reg. v. M'Donald*, 31 U. C. Q. B. 337; *Reg. v. Dunlop*, 15 U. C. Q. B. 118.

(b) 32 & 33 Vic. c. 19. s. 49.

(c) See s. 51.

(d) *R. v. Evans*, 5 C. & P. 553. But see now 32 & 33 Vic., c. 29, s. 50, *ante*, p. 78.

(e) *Reg. v. M'Corkill*, 8 L. C. J. 283.

(f) *Reg. v. Carson*, 14 U. C. C. P. 309; *Reg. v. Williams*, 2 Den. C. C. 61.

but an offence at common law, the allegation was immaterial and unnecessary. (a)

It is no defence to an indictment for forging a note, that the prisoner may have expected, and fully intended, to pay it when it became due. (b)

The offence of forgery, at common law, was only a misdemeanor, and it fell within the general class of cheats. (c)

*Cheats and Frauds.*—These offences at common law consisted in the fraudulent obtaining the property of another, by any deceitful and illegal practice or token, short of felony, which affects, or may affect, the public, or such frauds as are levelled against the public justice of the realm. (d)

In the case of forgery, it was sufficient that the party *might be* prejudiced by the false instrument, but nothing could be prosecuted as a cheat at common law without an *actual prejudice*, which was an *obtaining* on the statute 33 Hy. 8. (e)

If a person, in the way of his trade or business, put, or suffer to be put, a false mark or token upon any article, so as to pass off as genuine that which is spurious, if such article be sold by such false token or mark, the person so selling may be indicted for a cheat at common law, but the indictment must allege that the article was passed off by means of such false token or mark.

Where an indictment alleged that the prisoner, being a picture dealer, knowingly kept in his shop a picture whereon the name of an artist was falsely and fraudulently painted, with intent to pass the picture off as the original work of the artist whose name was so painted,

(a) *Reg. v. Carson*, 14 U. C. C. P. 309; *Reg. v. Williams*, 2 Den. C. C. 61.

(b) *Reg. v. Craig*, 7 U. C. C. P. 244.

(c) 2 Russ. Cr. 709 *et seq.*

(d) *Reg. v. Roy*, 11 L. C. J. 94, per *Drummond*, J; and see 2 Russ. Cr. 613.

(e) 2 Russ. Cr. 613; *Ward's case*, 2 Str. 747.



and that he sold the same to H. F., with intent to defraud, and *did thereby defraud him*, but without stating that the picture was passed off by means of the artist's name being so falsely painted:—*Held*, that such painting of the artist's name was putting a false token on the picture, and that the selling *by means thereof* would be a cheat at common law, but that the want of such last averment was fatal. (a)

Where a person contracts to deliver loaves of bread, of a certain weight, at a certain price, the delivery of a less quantity, (*i. e.*, less in weight,) than that contracted for, is a mere private fraud, and not indictable, if no false weights or tokens have been used. (b)

*False Personation*.—Falsely personating a voter at a municipal election is not an indictable offence. Our statute law contains no provision on the subject, nor is it an offence at common law. (c) It would seem that, in an indictment for this offence, there should be an averment negating the identity of the defendant with the voter suggested to be personated. (d)

Falsely assuming to vote in the name of another person, whose name appears on the list of voters, is made a misdemeanor, by Con. Stats. Can. c. 6, ss. 60 & 87, and can be tried only in a Criminal Court, and the fine imposed on conviction in such Court. (e)

A person cannot be convicted under the 14 & 15 Vic., c. 105, s. 3, of personating a "person entitled to vote," if the person personated be dead at the time, as the words can only mean a person entitled to vote at the time when the personation takes place. (f)

To complete the offence of inducing a person to per-

(a) *Reg. v. Closs*, 4 U. C. L. J. 98; *Dears. & B.* 460; 27 L. J. (M. C.) 54.

(b) *Reg. v. Eagleton*, 1 U. C. L. J. 179; *Dears.* 515; 24 L. J. (M. C.) 158.

(c) *Reg. v. Hogg*, 25 U. C. Q. B. 66.; *Reg. v. Dent*, 1 Den. C. C. 159.

(d) *Ib.* 68, per *Hagarty*, J.

(e) *Barrette v. Bernard*, 14 L. C. R. 435.

(f) *Whiteley v. Chappell*, L. R. 4 Q. B. 147.

sonate a voter, at a municipal election, under the Imp. Act, 22 Vic., c. 35, s. 9, it is not necessary that the personation should be successful, and a conviction for the offence was held good, though it did not set out the mode or facts of the inducement. (a)

*Malicious Injuries.*—Injuring or destroying private property is, in general, no crime, but a mere civil trespass, over which a Magistrate has no jurisdiction, unless by Statute. (b)

The 32 & 33 Vic., c. 22, contains provisions respecting malicious injury to property; but, to bring a case within this Statute, the act must have been wilfully or maliciously done. (c) But malice conceived against the owner of the property, in respect of which it shall be committed, is not necessary. (d)

It is not necessary that the damage done should be of a permanent kind. Plugging up the feed pipe of a steam engine is an offence within s. 19 of this Act. The prisoner plugged up the feed-pipe of a steam engine, and displaced other parts of the engine in such a way as rendered it temporarily useless, and would have caused an explosion if the obstruction had not been discovered, and, with some labour, removed:—*Held*, that he was guilty of damaging the engine, with intent to render it useless, within the meaning of this clause. (e)

It was held under the former Statute, 4 & 5 Vic., c. 26, s. 5, the words of which were not so comprehensive as the present Statute, that an apparatus for manufacturing potash, consisting of ovens, kettles, tubs, etc., was not a machine or engine, the cutting, breaking, or damaging of which was felonious. (f)

(a) *Reg. v. Hague*, 12 W. R. 310

(b) *Powell v. Williamson*, 1 U. C. Q. B. 155, per *Robinson*, C. J.

(c) *Powell v. Williamson*, *supra*.

(d) s. 66.

(e) *Reg. v. Fisher*, L. R. 1 C. C. R. 7; 35 L. J. (M. C.) 57.

(f) *Reg. v. Doherty*, 2 L. C. R. 255.

Under s. 45 of the 32 & 33 Vic., c. 22, upon an indictment for maliciously wounding a horse, it is not necessary to prove that any instrument was used to inflict the wound, and the word "wound" must be taken in the ordinary sense. (a)

Ss. 20 & 28 of the 4 & 5 Vic., c. 26, gave a summary remedy, not for trespassing on the close, but for malicious injuries to the tree. (b)

A summons for malicious injury to property, under the former Statute, must have been upon complaint under oath, and a conviction stating that the offence complained of was committed "depuis environ huit jours," was held bad for want of certainty. (c)

The offence of wilfully injuring a fence, etc., under the (N. B.) 1 Rev. Stats., c. 153, s. 11, is a misdemeanor, *not* punishable by summary conviction. (d)

*Arson* at common law is an offence of the degree of felony, and has been described as the malicious and wilful burning of the house of another. (e) It is to be observed that the burning must be of the house of *another*, but the burning a man's own house in a town, or so near to other houses as to create danger to them, is a great misdemeanor at common law. (f)

The *owner* of a house would, at common law, commit no offence by destroying it, whether by fire or by pulling it down to the ground, provided that, in so doing, he did not infringe the maxim, *sic utere tuo ut alium non lædas*, and even by non-observance of that rule he would only commit a civil injury, and not a crime. (g)

Arson, at common law, being an injury to the actual

(a) *Reg. v. Bullock*, L. R. 1 C. C. R. 115; 37 L. J. (M. C.) 47.

(b) *Madden v. Farley*, 6 U. C. Q. B. 213, per *Robinson*, C. J.

(c) *Ex parte Hook*, 3 L. C. R. 496.

(d) *Ex parte Mulhern*, 4 Allen, 259.

(e) 2 Russ. Cr. 1024.

(f) *Ib.*

(g) *Reg. v. Bryans*, 12 U. C. C. P. 163-4, per *Draper*, C. J.

possession, and not merely a wrong in destroying a valuable property, when the Legislature extends the limits of the crime we must construe their enactments strictly. (a)

By the 32 & 33 Vic., c. 22, s. 3, the setting fire to any house, whether the same is then in the possession of the offender or in the possession of any other person, is made felony; and now, under this Statute, it is immaterial whether the house be that of *another* or of the defendant himself.

The words in this Statute are "set fire to" merely, and, therefore, it is not necessary to aver in the indictment that the house, etc., was *burnt*, nor is proof required that it was actually consumed. (b) But within this Act, as well as to constitute the offence of arson at common law, there must be an actual burning of some part of the house, a bare intent or attempt to do it is not sufficient. (c)

Where a small faggot, having been set on fire on the boarded floor of a room, the boards were thereby "scorched black but not burnt," and no part of the wood was consumed, this was held not a sufficient burning. (d) Now, by s. 8 of the Statute, setting fire to any matter or thing, being in, against, or under any building, under such circumstances, that if the building were thereby set fire to, the offence would amount to felony, is made felony.

The burning must also be malicious and wilful, otherwise it is only a trespass. No negligence or mischance, therefore, will amount to such a burning. (e) But malice against the owner of the property is not necessary. (f)

The decisions with respect to burglary apply also to

(a) *M'Nab, v. M'Grath*, 5 U. C. Q. B. O. S. 522, per *Robinson*, C. J.

(b) *R. v. Salmon*, R. & R. 26; *R. v. Stallion*, 1 Mood. C. C. 398; Arch. Cr. Pldg. 509.

(c) *Ib.*

(d) *R. v. Russell*, C. & Mar. 541.

(e) 2 Russ. Cr. 1025.

(f) 32 & 33 Vic. c. 22, s. 66.

arson, as to what may be considered a house, shop, etc. (a)

A shop is defined to be a place where things are publicly sold. It also has another signification, as a room where some kind of manufactures are carried on, as a shoemaker's shop, etc.; but this sense is merely confined to common speech, and the Legislature does not generally use the word in this sense, and in the 3 Wm. 4, c. 3, they clearly did not, because buildings used in carrying on any trade or manufacture were protected under a separate and distinct provision, although the term shop had been used before, and, in fact, by their adding the qualification used, in carrying on *any trade* or manufacture, the Legislature evinced that they intended to have reference to the purpose for which the building was actually used, at the time of the offence. (b)

Where, on an indictment under this Statute, it appeared that the building set fire to had not, for a year or more, been occupied as a shop; it contained some iron in the cellar, but was otherwise not inhabited for any purpose; and it was contended that the building was a shop, within the meaning of the Statute, but, per *Robinson*, C.J., (c) it was clearly not the intention of the Legislature to make the burning of any and every building arson, and the reason which may have led to including dwelling-houses, barns, or shops, can only be intended to apply to buildings *occupied*, as dwelling-houses, barns, or shops. Not that a dwelling-house, etc., can only be regarded as being legally such at the very moment when it is actually being used for its appropriate purpose. If left for a moment *animo revertendi* it is still the dwelling-house of its possessor. A mere building, though fitted up, or intend-

(a) *M'Nab v. M'Grath*, 5 U. C. Q. B. O. S. 522.

(b) *M'Nab v. M'Grath*, *supra*, 520.

(c) *Ib.* 519.

ed, for any of these purposes, does not acquire its character until it has been appropriated to its proper purpose, and, after it has been so appropriated, the use must be continued to the time of the offence, or, if discontinued, must be discontinued under such circumstances as indicate an intended immediate resumption.

A small shanty, about twelve feet square, slightly constructed with boards placed upright, having a shed-roof of boards but no floor, nor any windows or openings for windows, having, however, a door not hung but fastened with nails, being used by a carpenter who was putting up a house near it, as a place of deposit for his tools and window-frames which he had made, but in which no work was carried on by him, and which had not been used as a workshop at any time, to any degree, was held not a building used in carrying on the trade of a carpenter, within the 4 & 5 Vic., c. 26, s. 3. (a)

A building, within the 32 & 33 Vic., c. 22, s. 7, need not necessarily be a completed or finished structure: it is sufficient that it should be a connected and entire structure. (b)

The building set fire to was one of seven, built in a row, intended for dwelling-houses, and built, in part, of machine-made bricks, all the walls, external and internal, of the house, being built and finished, the roof being on and finished, and a considerable part of the flooring laid. The internal walls and ceiling were prepared, and ready for plastering, and the house was in a forward state towards completion, but was not completed:—*Held* to be a building within the meaning of this section.

Where the question of building or no building is properly left to the jury, their finding is conclusive. (c)

(a) *Reg. v. Smith*, 14 U. C. Q. B. 546.

(b) *Reg. v. Manning*, L. R. 1 C. C. R. 338.

(c) *Ib.*

Where the offence consists of the setting fire to the house of a third person, the intent to injure that person is inferred from the act, for every person is deemed to intend the natural consequence of his own act. (a) But this doctrine can only arise where the act is wilful; and, therefore, if the fire appear to be the result of accident, the party who is the cause of it will not be liable. On the other hand, where the defendant is charged with setting fire to his own house, the intent to defraud cannot be inferred from the act itself, but must be proved by other evidence. (b)

It has been held, on an indictment under the Con. Stats. Can., c. 93, s. 4, against a person for setting fire to his *own* house, that it was necessary to prove an intent to injure or defraud, in order to shew the act to be unlawful and malicious, within the meaning of the Statute. (c) The Court will infer the act to be unlawful and malicious when the intent to injure or defraud is shewn. (d)

An indictment, under this Statute, need not have alleged the intent to injure or defraud, as the Statute did not make the intent part of the crime, and differed from the English in this respect. (e) The 32 & 33 Vic., c. 22, s. 3, makes the intent part of the crime, and it is apprehended that the intent must now be alleged in the indictment, notwithstanding the above cases. (f)

In *Greenwood's* case, the prisoner being indicted for unlawfully and maliciously attempting to burn his own house, by setting fire to a bed in it, it appeared in evidence that the house in question was so closely adjoining

(a) See *R. v. Farrington*, R. & R. 207.

(b) See Arch. Cr. Pldg. 511-2; *R. v. Gilson*, R. & R. 138.

(c) *Reg. v. Bryans*, 12 U. C. C. P. 161.

(d) *Ib.*

(e) *Reg. v. Bryans*, *supra*; *Reg. v. Greenwood*, 23 U. C. Q. B. 250.

(f) See Arch. Cr. Pldg. 508.

to another house, both being of wood, and the space between the two being only a few inches, that it would be next to impossible that the one should be burnt without also burning the other; that the dead body of a woman was in the bed at the time; that her death had been caused by violence; that she had been recently delivered of a child, whose body was found in the kitchen, and that she had lived in the house since it had been rented by the prisoner, who frequently went there at night. It was also shewn that the prisoner had been indicted for the murder of this woman, and acquitted, and the record of his acquittal was put in. This evidence was objected to, as tending to prejudice the prisoner's case; but the Court held it admissible, for, the house being the prisoner's, it was necessary to shew that his attempt to set fire to it was unlawful and malicious, and that these facts would prove it, and might also satisfy the jury that, the murder being committed by another, the prisoner's act was intended to conceal it. (a)

The intention must be to injure some person who is not identified with the defendant. Therefore, a married woman cannot be indicted for setting fire to the house of her husband, with intent to injure him. (b) An indictment on s. 3 of the 32 & 33 Vic., c. 22, must allege the intent to injure or defraud. (c)

Where the prisoners are indicted under the 32 & 33 Vic., c. 22, s. 3, for unlawfully, maliciously, and feloniously setting fire to a shop "of and belonging to" one of the prisoners, the averment of ownership is an immaterial averment, which may be rejected as surplusage, and need not be proved; and an intent to injure another person, whose name is not stated in the indictment, may

(a) 23 U. C. Q. B. 250.

(b) *Reg. v. March*, 1 Mood. C. C. 182; Arch. Cr. Pldg. 512.

(c) *Reg. v. Paice*, 1 C. & K. 73.



be proved in support of the indictment; for, by s. 63 of the Act, it is not necessary to allege an intent to injure or defraud any particular person. (a)

The word "arson" is not used as a term of art, as "murder," or the like, in legal documents; but is used to express what indictments describe as wilfully, maliciously, and feloniously, setting fire to a house, etc. (b)

The prisoner was charged with inciting one W. to attempt feloniously, unlawfully, and maliciously to set fire to a certain dwelling-house, by then and there saturating a blanket with coal oil, and placing it against said dwelling-house, and sprinkling coal oil upon the doors and sides thereof, and attempting to apply a burning match to said oil, said house being at the time inhabited. The evidence shewed that W., after arranging, under the prisoner's directions, the saturated blanket, so that, if the flame were communicated to it, the building would have caught fire, lighted a match, and held it in his fingers till it was burning well, and then put it down towards the blanket, and got it within an inch or two of the blanket, when the match went out, the blaze not touching the blanket, and he throwing away the match, and leaving, without making any second attempt. No fire was actually communicated to the oil or blanket:—*Held*, that these were overt acts immediately and directly tending to the execution of the principal crime, (c) and that the prisoner was properly convicted under the 32 & 33 Vic., c. 22, s. 12, of an attempt to commit arson. (d)

On an indictment under the corresponding English sec. of 32 & 33 Vic., c. 22, s. 8, it appeared that the prisoner, from ill-will and malice against a person lodging in a

(a) *Reg. v. Newbould*, L. R. 1 C. C. R. 344.

(b) *Re Anderson*, 11 U. C. C. P., 69, per *Hagarty*, J.

(c) See *ante*, p. 85.

(d) *Reg. v. Goodman*, 22 U. C. C. P. 338.

house, made a pile of her goods on the stone floor of the kitchen, and set fire to them, under such circumstances that the house would almost certainly have been burned, had not the police extinguished the fire before the house was actually ignited. The Judge, at the trial, told the jury that, if the house had caught fire from the burning goods, the question whether the offence would have amounted to felony would have depended upon whether such a setting fire to the house would have been malicious, and with intent to injure, so as to bring the case within the corresponding section of 32 & 33 Vic., c. 22, s. 3; and that, though the prisoner's object was only to destroy the goods, and injure the owner of them, and not to destroy the house, or injure the landlord, yet, if they thought he was aware that what he was doing would probably set the house on fire, and so necessarily injure the owner, and was at best reckless whether it did so or not, they ought to find that, if the building had caught fire, from the setting fire to the goods, the offence would have been felony, otherwise not. The jury found that the prisoner was guilty, but not so that, if the house had caught fire, the setting fire to the house would have been wilful and malicious:—*Held*, that, upon the finding of the jury, the prisoner was not guilty of felony; for their finding was only that the goods were set on fire, with intent to injure the owner of the *goods*, and there was no section in the Act which makes the wilful and malicious setting fire to goods felony. (a)

It is a felony, under 14 & 15 Vic., c. 19, s. 8, coupled with 7 Wm. 4, and 1 Vic., c. 89, s. 3, for a man to set fire to goods in a house in his own occupation, with intent to defraud an insurance company, by burning the goods. One of these Acts makes it felony to set fire to a house,

(a) *Reg. v. Child*, L. R. 1 C. C R. 307.

with intent to defraud. The other, felony to set fire to goods in a house, the setting fire to which house would be felony. If the intention to defraud is meant to extend to the defrauding of any person who may be defrauded by the effects in the house being destroyed, then, in this case, it would be felony to set fire to the house; but setting fire to goods in a house, the setting fire to which house would be felony, is felony. (a)

Upon an indictment under 7 Wm. 4, and 1 Vic., c. 89, s. 10, for setting fire to a stack of grain, it was proved that the prisoner set fire to a stack of flax, with the seed in it, and the jury found that flax seed is grain :—*Held*, that a conviction upon the above facts and finding of the jury was right. (b)

*Perjury and Subornation of Perjury.*—Perjury at common law is defined, to be a wilful false oath by one, who being lawfully required to depose the truth in any proceeding in a Court of Justice, swears absolutely, in a matter of some consequence to the point in question, whether he be believed or not. (c) Subornation of perjury, by the common law, is an offence, in procuring a man to take a false oath, amounting to perjury, who actually takes such oath. (d) These offences are now misdemeanors, by the 32 & 33 Vic., c. 23. s. 1.

An oath or affirmation, to amount to perjury, must be taken in a judicial proceeding, before a competent jurisdiction; and must also be material to the question depending, and false. (e)

The swearing falsely by a voter, at an election of alderman or common councilman for the city of Toronto, that he is the person described in the list of voters, not being

(a) *Reg. v. Lyons*, 5 U. C. L. J. 70; Bell C. C. 38.

(b) *Reg. v. Spencer*, 3 U. C. L. J. 19; Dears. & B. 131; 26 L. J. (M. C.) 16.

(c) 3 Russ. Cr. 1.

(d) *Ib.*

(e) *R. v. Aylett*, 1 T. R. 69; 3 Russ. Cr. 2.

made perjury by any express enactment, is not an oath upon which, by the common law, perjury can be assigned, not being in any judicial proceeding, or anything tending to render effectual a judicial proceeding. (a) This would probably now be perjury, under the 32 & 33 Vic. c. 23, s. 2. Taking a false oath is not an offence in law, unless it be in a judicial proceeding, or on some other lawful occasion, on which it has been made an offence by law to swear falsely. (b)

Wilful and corrupt false swearing before a local marine board, lawfully constituted, upon a matter material to an enquiry, then being lawfully investigated by them, in pursuance of the 17 & 18 Vic., c. 104, is perjury and indictable, as such, for it is in a tribunal invested with judicial powers. (c)

Although a summons in bastardy is irregularly issued, yet, if the defendant actually appears, he thereby waives any irregularity there might be in the process; consequently the proceeding of the Justices, in taking his evidence, is a valid judicial proceeding sufficient to make the prisoner's false swearing, in the course of it, perjury. (d)

Where the affidavit is not taken in a judicial proceeding, and, therefore, does not constitute perjury in its strict sense, the party may nevertheless be indicted for a misdemeanor at common law. (e) In the latter case, A. was indicted for perjury in an affidavit made, under the Bills of Sale Act, for the purpose of having a bill of sale filed. The indictment was in the ordinary form. The affidavit was sworn before a Commissioner for taking affidavits in the Court of Queen's Bench. A. having been found guilty,

(a) *Thomas v. Platt*, 1 U. C. Q. B. 217.

(b) *Hogle v. Hoyle*, 16 U. C. Q. B. 520, per *Robinson*, C. J.

(c) *Reg. v. Tomlinson*, L. R. 1 C. C. R. 49; 36 L. J. (M. C.) 41.

(d) *Reg. v. Fletcher*, L. R. 1 C. C. R. 320.

(e) *R. v. Chapman*, 1 Den. 432, 2 C. & K. 846; *Reg. v. Hodgkiss*, L. R. 1 C. C. R. 212; 39 L. J. (M. C.) 14.

it was held that the offence did not strictly constitute perjury; but that, nevertheless, the conviction should be affirmed, because A. was guilty of taking a false oath, where an affidavit was required for the purposes of a Statute, which offence was sufficiently charged in the indictment, and was, under the circumstances, a common law misdemeanor, to the punishment, for which he might be sentenced. (a)

It has been held that wilful false swearing in any affidavit made in a judicial proceeding, and sworn before a Commissioner, legally authorized to take such affidavit, is perjury at common law; (b) but this case must be treated as modified by the preceding one.

It is quite clear, from numerous authorities, that, unless the party administering the oath has competent authority to administer it, the false swearing will not amount to perjury. There must be authority to administer the oath in the particular proceeding, in which the witness is sworn. An affidavit made by the prisoner, in a review case tried before a Justice of the Peace, the affidavit being sworn before a Commissioner, authorized to take affidavits in the Supreme Court, cannot under the (N.B.) 1 Rev. Stat. c. 161 s. 30, be made the subject of an indictment for perjury, for the words "officer authorized" mean an officer authorized to take affidavits in the particular proceeding, in which the witness is sworn. (c) The person administering the oath must be exercising his jurisdiction, at the time the oath is administered. (d)

On an indictment for perjury, committed upon the hearing of a complaint before a Magistrate, the information and complaint having been proved :—*Held*, upon a

(a) *Reg. v. Hodgkiss*, L. R. 1 C. C. R. 212.

(b) *Milner v. Gilbert*, 3 Kerr, 617.

(c) *Reg. v. M'Intosh*, 1 Hannay, 372.

(d) *M'Adam v. Weaver*, 2 Kerr, 176.

case reserved that, to give the magistrate jurisdiction, it was unnecessary to shew any summons, issued or any step taken, to bring the person complained of before the Magistrate, for, so long as he was present, the manner of his getting there was immaterial. (a)

The complaint before the magistrate was for selling liquor without licence, contrary to the (Ont.) 32 Vic., c. 32, and the indictment did not shew where the liquor was sold, and s. 25 of the Act requiring the proceedings, to be carried on before Magistrates, "having jurisdiction in the municipality, in which the offence is committed," it consequently did not appear from the indictment that the Magistrate had jurisdiction, to hear the complaint or administer the oath, and the indictment therefore was insufficient in law. It would seem that it was also defective, for not shewing that the person complained against was present, or that a summons issued, and that the Magistrate was authorized to proceed *ex parte*, if the person complained against did not appear, after due service of the summons upon him. (b)

Defendant, by verbal agreement, engaged to work as a farm servant with one T., on the 9th of April, 1860, at \$8 per month, the bargain being, that he should work for half a month, and as long after as he was found to suit, or until the fall ploughing was done. He left on the 21st of November, having told T., about three weeks previously, that he would like to go then, to which T. assented. Defendant complained of T., before a magistrate, for not paying his wages, and was indicted for perjury committed on that occasion, and found guilty :—*Held*, that this could not be treated as a hiring for a year, or any period beyond it, and that it was such a hiring as came within

(a) *Reg. v. Mason*, 29 U. C. Q. B. 431.

(b) *Ib.* 434, per *Wilson, J.*

the Con. Stats. U. C., c. 75, and under the 12th section of the Act, gave the Magistrate jurisdiction to adjudicate on the matter, and afford redress, and the conviction was affirmed. (a) The prisoner was indicted for perjury committed before a Police Magistrate, upon a summons taken out by him as an apprentice against his master, under the 4 Geo. 4 c. 34. s. 2, for non-payment of wages;—*Held*, that the Magistrate had jurisdiction to adjudicate upon the complaint, although the summons was not taken out until the relation of master and servant had ceased, and that, at any rate, he had jurisdiction to enquire into the existence of that relation. (b) The prisoner was convicted of perjury, alleged to have been committed upon the hearing of an application for an order of affiliation. The summons to the prisoner was not produced on the trial, nor was secondary evidence given of its contents, nor was it proved that such summons had been served on the prisoner. The information laid by the mother was duly proved, and it was shewn that the putative father appeared before the Justices, and that evidence was given on both sides, and the prisoner gave the evidence which was the subject of the indictment for perjury :—*Held*, that the father having appeared, and not having raised any objection to the summons, it was not necessary, in order to shew jurisdiction in the Justices, to refer to it, or give any evidence of its existence on the trial for perjury. (c)

A woman, having obtained judgment against the defendant in a County Court, married, and afterwards, in her maiden name, took out a judgment summons against him in another district, which, on the hearing, the Judge amended by inserting her husband's name, and the de-

(a) *Reg. v. Walker*, 21 U. C. Q. B. 34.

(b) *Reg. v. Proud*, L. R. 1 C. C. R. 71.

(c) *Reg. v. Smith*, L. R. 1 C. C. R. 110; 37 L. J. (M. C.) 6.

defendant was then sworn and examined, and was afterwards indicted and convicted at that hearing:—*Held*, that he was improperly convicted, as he had been sworn in a cause in which there was no judgment, and in which the County Court had no jurisdiction. (a)

The Con. Stats. U. C., c. 52, s. 73, empowers any Justice of the Peace to examine, upon oath, any person who comes before him to give evidence touching loss by fire, in which a Mutual Insurance Company is interested, and to administer to him the requisite oath.

The defendant was convicted on an indictment for perjury, assigned upon a clause in his affidavit, made in compliance with one of the conditions of a policy issued to him by a Mutual Fire Insurance Company, requiring the assured, in case of loss by fire, to deliver unto the company a detailed statement, under oath, of his loss, and value of the property destroyed. The policy of insurance containing this condition not having been produced:—*Held*, that, although the defendant's affidavit referred to the policy in such a way that its existence might have been fairly inferred, yet the conviction was bad, in consequence of the non-production of the policy, which would have shewn the authority of the Justice of the Peace, before whom the affidavit was made, to administer the oath, and also the condition above referred to, of which there had been no proof whatever, although the perjury assigned had been committed in complying with it. (b)

The condition of the policy, in this case, required the assured to make an affidavit touching a loss by fire, in which the company was interested, and the clause of the Statute above referred to empowered the Justice to ad-

(a) *Reg. v. Pearce*, 9 U. C. L. J. 333; 3 B. & S. 531; 32 L. J. (M. C.) 75.

(b) *Reg. v. Gagan*, 17 U. C. C. P. 530.



minister an oath, in such case coming within the condition; consequently, proof of the policy and condition was necessary to shew the authority of the Justice.

By the 32 & 33 Vic., c. 23, s. 4, the Justice or Commissioner is now required to take the affidavit or declaration.

On an indictment for perjury, on the hearing of a complaint for trespass in pursuit of game, it appeared that the complaint alleged that the defendant was in the close for the purpose of destroying game, but it did not allege that it was for the purpose of destroying game *there*. The complaint was held to be sufficient in form to give the Justices jurisdiction, so as to make false evidence, on the hearing, perjury. (a)

The Clerk of a Division Court, acting under the 13 & 14 Vic., c. 58, s. 102, issued an interpleader summons on his own authority, without the bailiff's request. The Statute requires the summons to be issued upon the application of the officer charged with the execution of the process. Both parties attended before a Barrister appointed by the Judge of the Court, who was ill. They thereby submitted to the jurisdiction, and an order was made under this section. The Judge afterwards granted a new trial, which took place. The defendant was convicted of perjury, committed on the hearing, after the granting of the new trial:—*Held*, that both parties having appeared in the first instance, the proceedings then could not be considered void, for want of a previous application by the bailiff, and were, consequently, final and conclusive. It was, therefore, not competent for the Judge to order a new trial, under s. 84 of this Act; consequently, the proceedings on the second trial were irregular and extra-judicial, and the false swearing taking place on it, the

(a) *Reg. v. Western*, L. R. 1 C. C. R. 122; 37 L. J. (M. C.) 81.

conviction was illegal, as there was no authority to administer the oath. (a)

The prisoner being indicted for perjury, in giving evidence upon a charge of felony against one E. G., it appeared that the felony, if committed at all, was committed in the County of Middlesex. The Justices, before whom the examination took place, entertained the charge and examined the witnesses within the City of London. The defendant's counsel objected, at the trial, that the Justices, being Justices of the County of Middlesex, had no jurisdiction, sitting in London, to examine into an offence committed outside the limits of that city. The objection being overruled, the point was reserved for the opinion of the Court:—*Held*, that the conviction was illegal on the ground taken, and it was, therefore, reversed. (b)

The provisions of the 23 Vic., c. 2, s. 28, that all affidavits required therein may be taken before "any Justice of the Peace," does not empower a Justice of the Peace to administer the oath anywhere in the Province, but only in the place where he acts as such Justice. The same interpretation of the Act applies to Commissioners for taking affidavits mentioned therein. (c)

Where the jurat of an affidavit states the place, it is *prima facie* evidence of administering the oath there. (d) A person is indictable who gives false evidence before a Grand Jury, on a bill of indictment, and the false swearing may be proved by the evidence of other witnesses, examined before them on the same bill. (e)

That part of the oath upon which the perjury is assigned must be *material* to the matter then under the considera-

(a) *Reg. v. Doty*, 13 U. C. Q. B. 398.

(b) *Reg. v. Row*, 14 U. C. C. P. 307.

(c) *Reg. v. Atkinson* 17 U. C. C. P. 295.

(d) *Ib.* 301, per *J. Wilson, J.*

(e) *R. v. Hughes*, 1 C. & K. 519; Arch. Cr. Pldg. 815.

tion of the Court. (a) But perjury may be assigned upon a man's testimony as to the credit of a witness. (b) So every question, in cross-examination, which goes to the witness's credit, as whether he has before been convicted of felony, is material for this purpose. (c)

In *R. v. Tyson* (b) a doubt was however expressed by *Kelly*, C. B., and *Byles*, and *Lush*, J. J., whether a false statement, which goes only to the credit of the person making it, can be the subject of an assignment of perjury. (d)

Upon the trial of one S. for robbery, the prisoner, in support of an *alibi*, swore, first, that S. was in a certain house at the time of the robbery; secondly, that S. had lived in that house for the last two years; and, thirdly, that he had never been absent from it more than two or three nights together during that time. In fact, S. had been confined in prison during one of these two years:—*Held*, that the second and third allegations were material, as tending to render more credible the truth of the first, and that the prisoner was rightly convicted of perjury assigned upon them. (e)

Where a prisoner, charged with robbery before a Magistrate, having cross-examined the prosecutor, whether he had not, the day before that of the alleged robbery, met him (the prisoner) in company with M., and proposed to him to commit a burglary, and the prosecutor having denied this, the prisoner called M. to prove it, the Court held that M.'s evidence was not material to the

(a) *R. v. Griep*, 1 Ld. Raym, 256; *R. v. Nichol*, 1 B. & Ald. 21; *R. v. Townsend*, 10 Cox, 356; 4 F. & F. 1089; Arch. Cr. Pldg. 816.

(b) 2 Salk. 514.

(c) *R. v. Lavey*, 3 C. & K. 26; *R. v. Overton*, 2 Mood. C. C. 263; C. & Mar. 655.

(d) See also *R. v. Gibbons*, L. & C. 109; 31 L. J. (M. C.) 98; Arch. Cr. Pldg. 817.

(e) *Reg. v. Tyson*, L. R. 1 C. C. R. 107; 37 L. J. (M. C.) 7; 16 W. R. 317.

issue, so that it could be made the subject of an indictment for perjury. (a)

On the trial of A. for perjury in an affidavit made by him, and used on the taxation of costs, the signature to the affidavit was proved to be in A.'s handwriting, but the Commissioner, who had administered the oath, was unable to identify A., as the person who made the affidavit. B. was therefore called as a witness, and swore that the affidavit was used before the taxing-master, when A. was present, and that it was then publicly said that it was A.'s affidavit. B. was afterwards indicted for perjury on A.'s trial, and it was held that the above evidence, given by him on that trial, was material as corroborative evidence of the affidavit having been made by A. (b) On the trial of an action of trover the plaintiff's case was that the defendant had tricked him out of the goods, the subject of the action, while the plaintiff was drunk. The defendant's case was that he had fairly bought the goods from the Plaintiff, who had sent for the goods from a railway station, where they were lying, had signed a delivery note for them, and had then sold them to the defendant. The defendant, who was called as a witness in support of his own case, swore that the plaintiff's name on the delivery note was plaintiff's writing, and that he saw him write it. It was held that this evidence was material to the issue, and, upon which, therefore, perjury might be assigned; the question in the action being, whether the plaintiff had been imposed on by a fraud while drunk, and it, therefore, became essential to ascertain, whether the handwriting on the delivery note, was his, as a step in ascertaining whether or not he was drunk at the time of the transaction. (c)

(a) *R. v. Murray*, 1 F. & F. 80.

(b) *Reg. v. Alsop*, 5 C. L. J. N. S. 159; 11 Cox, 264.

(c) *Reg. v. Naylor*, 11 Cox, 13; 16 W. R. 374.

It is still a moot point whether, on an indictment for perjury, the materiality of the matter, on which the false swearing is proved, is a question of fact for the jury, or a question of law for the Judge, but according to the better opinion, it ought to be regarded in the latter light. (a)

Some doubt has been thrown upon the doctrine that the matter, upon which perjury is assigned, must be material to the enquiry. *Erle C. J.*, in *Reg. v. Mullany* (b) suggested it, as worthy of careful consideration, whether a person might not be guilty of perjury, who swears falsely on a matter immaterial to the enquiry, with intent, to mislead the Court. (c)

In this case, after judgment against A., in a County Court suit, the Judge asked him whether his names were not Bernard Edward Mullany, preparatory to making an order for immediate payment of the debt, or for payment by instalments. A. had been sued by the names Bernard Edward Mullany, and he answered that his name was Edward Mullany only. The Judge, therefore, struck out the case. A. was indicted for perjury in stating that his name was Edward Mullany only, contrary to the fact as proved, and it was held that the evidence as to his name was material, and that he was therefore properly convicted of perjury. (d) Now, by the 32 & 33 Vic., c. 23, s. 7, all evidence, and proof whatsoever, whether given or made orally, or by, or in any affidavit, affirmation, declaration, examination or deposition shall be deemed and taken to be material, with respect to the liability of any person, to be proceeded against, and punished for wilful and corrupt perjury, or for subornation of perjury.

(a) *Reg. v. Courtney*, 7 Cox, 111; 5 Ir. L. R. N. S. 434; *R. v. Dunston*, Ry. & M. 109; but see *R. v. Lavey*, 3 C. & K. 26; *R. v. Goodard*, 2 F. & F. 361; Arch. Cr. Pldg. 817-8.

(b) L. & C. 593; 34 L. J. (M. C.) 111.

(c) Arch. Cr. Pldg. 818.

(d) *Ib.*

The matter sworn must be either false in fact, or if true, the defendant must not have known it to be so. But a man may be indicted for perjury, in swearing that he *believes* a fact to be true, which he must know to be false. (a)

The false oath must be taken deliberately and intentionally; for, if done from inadvertence or mistake, it cannot amount to voluntary and corrupt perjury. (b)

It would seem that perjury may be assigned, when the oath is administered upon the common prayer book of the Church of England. (c)

Where, in an indictment for perjury, the defendant, was alleged to have sworn that no notice of the disqualification of a candidate for Township Councillor had been given previous to, or at the time of holding, the election, the perjury assigned being that such notice had been given *previous* to the election, and the notice appearing to have been given on the nomination of the candidate objected to:—*Held*, that the assignment of perjury was not proved as an election, under the Municipal Act, is commenced when the returning officer receives the nomination of candidates, and it is not necessary to constitute an election, that a poll should be demanded. (d)

The false oath must be clear and unambiguous. Where a joint affidavit made by defendant and one D., stated \* \* each for himself, maketh oath, and saith that, etc., and that he, this deponent, is not aware of any adverse claim to or occupation of said lot. The defendant having been convicted of perjury upon this latter allegation:—*Held*, that there was neither ambiguity nor doubt in what each defendant said; but that each, in substance,

(a) *R. v. Pedley*, 1 Leach, 327; *R. v. Schlesinger*, 10 Q. B. 670; 17 L. J. (M. C.) 29; Arch. Cr. Pldg. 818.

(b) *Ib.* 818-9.

(c) *M<sup>r</sup> Adam v. Weaver*, 2 Kerr, 176; *Rokeby v. Langston*, 2 Keb. 314.

(d) *Reg. v. Cowan*, 24 U. C. Q. B. 606.

stated that he was not aware of any adverse claim to or occupation of said lot. (a)

It would seem that a magistrate taking an affidavit without authority is guilty of a misdemeanor, and that a criminal information will lie against him for so doing. (b)

To constitute perjury at common law, it is not necessary that an affidavit should be read or used; for the crime is complete on the affidavit being sworn to, though no use was afterwards made of it; but, under the 5 Eliz. c. 9, as nothing can be an offence within it, unless some one is actually aggrieved, the affidavit must be read or used. (c)

To sustain a conviction for perjury, it is not necessary that the jurat of the affidavit, upon which the perjury is assigned, should contain the *place* at which the affidavit was sworn, for the perjury is committed by the taking of the oath, and the jurat, so far as that is concerned, is not material, and although through the defective jurat the affidavit could not be received in Court, yet perjury may be committed in an affidavit which the Court would refuse to read. The jurat is no part of the affidavit. (d)

In the affidavit in question in this case there was no statement as to where it had been sworn, either in the jurat or elsewhere, except the marginal venue, "Canada, County of Grey, to wit"; but the contents showed that it related to lands in the County of Grey, and it was proved that defendant subscribed the affidavit; that the party before whom it purported to have been sworn was a Justice of the Peace for that County, and had resided there for some years, and subscribed the jurat as a Justice of the Peace; that the affidavit, had been received, through the Post Office, by the agent of the Crown

(a) *Reg. v. Atkinson*, 17 U. C. C. P. 295.

(b) *Jackson v. Kassel*, 26 U. C. Q. B. 346, per *Draper*, C. J.

(c) *Milner v. Gilbert*, 1 Allen, 57.

(d) *Reg. v. Atkinson*, 17 U. C. C. P. 295.

Lands there, by whom it was forwarded to the Commissioner of Crown Lands, and that, subsequently, a patent for the Lot issued to the party in whose behalf the affidavit had been made: and this was held evidence from which it might be inferred that the affidavit was sworn in the County of Grey, and that the jury had properly so inferred:—*Held*, also, that if the affidavit was sworn in the County of Grey, the proof of the swearing by the Justice of the Peace, and the taking of the oath by the defendant, were made out by proving their signatures. (a)

It has been held that, on an indictment for perjury, the defendant must appear and submit to the jurisdiction of the Court, before he can be allowed to plead, and that this rule applied to misdemeanors as well as felonies. (b)

An indictment for perjury charged that it was committed on the trial of an indictment against A. B., at the Court of Quarter Sessions for the County of B., on the 11th of June 1867, *on a charge of larceny*:—*Held*, sufficient, and that it was not necessary to specify the property stolen, the ownership thereof, or the locality from which it was taken, nor to allege that the indictment was in the name of the Queen, as the Court must take judicial notice of the fact that Her Majesty alone could prosecute on a charge of larceny. (c) This decision was, to some extent, founded on the provisions of the Con. Stats. C. c. 99, s. 39 & 51.

The 32 & 33 Vic., c. 23, s. 9, are the same in substance, so that the decision will still hold.

Although, in an indictment for obtaining money or goods by false pretences, the property in the money or

(a) See *Reg. v. Greenland*, L. R. 1 C. C. R. 65, as to affidavits under the 7 Geo. 4, c. 23.

(b) *Reg. v. Maxwell*, 10 L. C. R. 45.

(c) *Reg. v. Macdonald*, 17 U. C. C. P. 635.



goods must be alleged, yet on reciting such a prosecution, upon which to found a charge of perjury, it seems the same particularity would not be necessary, otherwise the false pretence should be set out, too, and it was only after a long course to the contrary that it was at length determined the false pretences should be set out in the indictment, for the specific offence. (a)

An indictment for perjury stated that a cause was pending in the County Court, in which A. and B. were plaintiffs and C. defendant; that, on the hearing of such cause, it "became a material question whether the said A. had, in the presence of the prisoner, signed at the foot of" a certain bill of account, purporting to be a bill of account between a certain firm called A. & Co. and the aforesaid C., a receipt for payment of the amount of the said bill, "and that the said prisoner did" falsely, corruptly, and maliciously swear that the said A. did, on a certain day, in the presence of the prisoner, sign the said receipt, (meaning a receipt at the foot of the said first mentioned bill of account for the payment of the said bill,) whereas, etc.:—*Held*, that the indictment was sufficiently certain. (b)

An indictment for perjury stated the offence to have been committed on the trial of "a certain indictment for misdemeanor," at the Quarter Sessions for the County of Salop, but it did not state what the misdemeanor was, so as to shew that the Court had jurisdiction to try it, nor did it expressly aver that the Court had such jurisdiction:—*Held*, that the indictment was good. (c)

The 32 & 33 Vic., c. 23, s. 9, renders it unnecessary to set forth the authority to administer the oath. This Act

(a) *Reg. v. Macdonald*, 17 U. C. C. P. 638, per A. Wilson, J.; *Rex v. Mason*, 2 T. R. 581.

(b) *Reg. v. Webster*, 5 U. C. L. J. 262; 1 F. & F. 515.

(c) *Reg. v. Dunning*, L. R. 1 C. C. R. 290.

was passed to do away with technical forms of indictments, and where an indictment contains every averment required by this section, it is by the express terms of the section sufficient, although it does not contain any express or equivalent averment that the Court had competent authority to administer the oath. (a)

Where it appeared, on the face of an indictment for perjury, that the statement complained of was made before a Justice of the Peace, in preferring a charge of larceny committed within his jurisdiction, it was held unnecessary to allege expressly that he had authority to administer the oath. (b)

In an indictment for perjury, which charged the defendant with having sworn falsely in certain proceedings before Justices, wherein he was examined as a witness, the allegation of materiality averred that "the said D. R. (the defendant) being so sworn as aforesaid, *it then and there* became material to enquire and ascertain, etc. :— *Held*, bad, as not sufficiently shewing that the alleged perjury was committed at the said proceedings, and that the words "upon the trial" should have been used. (c)

In 32 & 33 Vic., c. 23, s. 9, "the substance of the offence charged" means that the charge must contain such a description of the crime that the defendant may know what crime he is called upon to answer; that the jury may appear to be warranted in their conclusion of guilty or not guilty upon the premises delivered to them, and that the Court may see such a definite crime that they may apply the punishment which the law prescribes. (d)

Where a prosecutor has been bound by recognizance

(a) *Reg. v. Dunning*, L. R. 1 C. C. R. 294-5, per *Channel*, B.

(b) *Reg. v. Callaghan*, 20 U. C. Q. B. 364.

(c) *Reg. v. Ross*, 1 Oldright, 683; and see 32 & 33 Vic. c. 29, Sch. A. Perjury 291.

(d) *Reg. v. Macdonald*, 17 U. C. C. P. 638, per *A. Wilson*, J.; *Rez v. Horne*, Cowp. 682.

to prosecute and give evidence against a person charged with perjury, in the evidence given by him on the trial of a certain suit, and the Grand Jury have found an indictment against the defendant, the Court will not quash the indictment because there is a variance in the specific charge of perjury contained in the information, and that contained in the indictment, provided the indictment sets forth the substantial charge contained in the information, so that the defendant has reasonable notice of what he has to answer. (a)

An indictment for perjury, based upon an oath alleged to have been made before the "Judge of the General Sessions of the Peace, in and for the said district" [of Montreal,] instead of, as the fact was, before the "Judge of the Sessions of the Peace in and for the City of Montreal," that being the proper title of the Judge, may be amended after plea of not guilty. (b)

Where an attempt to incite a woman to take a false oath consisted of a letter written by defendant, dated at Bradford, in the County of Simcoe, purporting but not *proved* to bear the Bradford post mark, and addressed to the woman at Toronto, where she received it:—*Held*, that the case could be tried in York; but *semble per Draper*, C. J., if the post mark had been proved, and the letter thus shewn to have passed out of the defendant's hands in Simcoe, intended for the woman, the offence would have been complete in that county, and the indictment only triable there; *per Hagarty*, J., the defendant would still, in that case, have caused the letter to be received in York, and might be tried there. (c) *Quære*, if the woman had committed the offence, it should have been

(a) *Reg. v. Broad*, 14 U. C. C. P. 168.

(b) *Reg. v. Pelletier*, 15 L. C. J. 146.

(c) *Reg. v. Clement*, 26 U. C. Q. B. 297.

charged as a misdemeanor, or as the statutory offence of perjury. (a)

But now the 32 & 33 Vic., c. 23, s. 10, contains provisions as to the form of the indictment, whether the offence has or has not been actually committed, and section 8 provides that any person accused of perjury may be tried and convicted in any district, county, or place, where he is apprehended, or is in custody.

The ordinary conclusion of an indictment for perjury, "did thereby commit wilful and corrupt perjury," may be rejected as surplusage. (b)

It has been held, under the 14 & 15 Vic, c. 100, s. 1, (c) that the Judge had power to amend an indictment for perjury, describing the Justices before whom the perjury was committed as Justices for a county, where they are proved to be Justices for a borough only. (d)

By 26 Vic., c. 29, s. 7, it is enacted that witnesses before commissioners for enquiring into the existence of corrupt practices at elections shall not be excused from answering questions, on the ground that the answers thereto may criminate them, and that "no statement made by any person, in answer to any question put by such commissioners, shall, except in cases of indictments for perjury, be admissible in evidence in any proceeding, civil or criminal":—*Held*, that, "except in cases of indictments for perjury," applies only to perjury committed before the commissioners; and, therefore, on an indictment for perjury, committed on the trial of an election petition, evidence of answers to commissioners appointed to enquire into the existence of corrupt practices at the election in question is not admissible. (e)

(a) *Reg. v. Clement*, 26 U. C. Q. B. 297; see *ante*, p. 84.

(b) *Reg. v. Hodgkiss*, L. R. 1 C. C. R. 212; 39 L. J. (M. C.) 14; *Ryalls v. Reg.* 11 Q. B. 781.

(c) See 32 & 33 Vic., c. 29, s. 71.

(d) *Reg. v. Western*, L. R. 1 C. C. R. 122; 37 L. J. (M. C.) 81.

(e) *Reg. v. Buttle*, L. R. 1 C. C. R. 248.

Some one or more of the assignments of perjury must be proved by two witnesses, or by one witness and the proof of other material and relevant facts, confirming his testimony. (a) And the assignment so proved must be upon a part of the matter sworn, which was material to the matter before the Court, at the time the oath was taken. (b)

Where three witnesses proved that the prisoner had made parol statements, contradictory to the truth of the statement upon which perjury was assigned, and the evidence of several witnesses went to confirm the truth of such parol statements: but there was no direct evidence that they were true—a conviction for perjury was supported.

The prisoner, having laid an information against a publican for keeping open after lawful hours, swore, at the hearing, that he knew nothing of the matter, except what he had been told, and that he did not see any person leave the house after eleven o'clock. Perjury having been assigned on this allegation, he was convicted. To establish that it was false, the magistrate's clerk proved a statement by the prisoner, when laying the information, that he had seen four men leave after eleven o'clock, and that he could swear to one W.: and two other witnesses proved that the prisoner had made a statement to this same effect to them. It was further proved that W. did leave after eleven—that, at the hearing, the prisoner had acknowledged that he had offered to smash the case for 30s.—and that he had talked of making the publican pay to settle it. A third witness proved that he had heard the prisoner offer to settle it for £1: and a fourth wit-

(a) *R. v. Boulter*, 2 Den. 396; 21 L. J. (M. C.) 57; 3 C. & K. 236; *R. v. Webster*, 1 F. & F. 515; *R. v. Braithwaite*, *ib.* 638; *Reg. v. Shaw*, L. & C. 579; 34 L. J. (M. C.) 169; Arch. Cr. Pldg. 822.

(b) *Id.* see also *R. v. Muscot*, 10 Mod. 194; *R. v. Lee*, 2 Russ. 650; *R. v. Gardner*, 8 C. & P. 737; *R. v. Roberts*, 2 C. & K. 607.

ness proved that the prisoner owned he had received 10s. to smash the case, and was to receive 10s. more:—*Held*, that the evidence was sufficient to establish the falsehood of the prisoner's statement made on oath, and that he was properly convicted of the perjury alleged. (a)

The 32 & 33 Vic., c. 23, s. 8, applies to all cases of perjury, and not merely to "perjuries in insurance cases," which is the heading under which the sections from 4 to 12 are placed. Therefore, a magistrate acting in the County of Halton has jurisdiction to take an information, and to apprehend and bind over, a person charged with perjury committed in the County of Wellington. (b)

See 31 Vic., c. 1, s. 6, sixteenthly, as to powers of officer to administer oath, and what statements shall be perjury.

*Conspiracy*.—A conspiracy is an agreement by two persons, or more, to do, or cause to be done, an act prohibited by penal law, or to prevent the doing of an act ordained under legal sanction, by any means whatever, or to do, or cause to be done, an act, whether lawful or not, by means prohibited by penal law. (c)

It is otherwise defined as a crime which consists either in a combination and agreement by persons to do some illegal act, or a combination and agreement to effect a legal purpose by illegal means. (d)

Conspiracy consists not merely in the intention of two or more, but in the agreement of two or more, to do an unlawful act, or to do a lawful act, by unlawful means. So long as such design rests in intention only, it is not indictable. But where two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties promise against promise, *actus contra actum*, cap-

(a) *Reg. v. Hook*, 4 U. C. L. J. 241; *Dears & B.* 606; 27 L. J. (M. C.) 222.

(b) *Reg. v. Currie*, 31 U. C. Q. B. 582.

(c) *Reg. v. Roy*, 11 L. C. J. 93, per *Drummond*, J.

(d) *Reg. v. Vincent*, 9 C. & P. 91, per *Alderson*, B.; *Reg. v. Roy supra*, 92, per *Drummond*, J.

able of being enforced if lawful, punishable if for a criminal object, or for the use of criminal means. (a) The conspiracy or unlawful agreement is the gist of the offence. (b)

As it is thus complete, by a mere combination of persons, to commit an illegal act, or any act whatever, by illegal means, the parties will be liable, though the conspiracy has not been actually carried into execution. (c) The actual execution of the conspiracy need not be alleged in the indictment. (d)

For the same reason, it is not necessary that the object should be unlawful; and in many cases an agreement to do a certain thing has been considered as the subject of an indictment for conspiracy, though the same act, if done separately by each individual, without any agreement amongst themselves, would not have been illegal. (e)

The rule is, that, when two fraudulently combine, the *agreement* may be criminal, although, if the agreement were carried out, no crime would be committed, but a civil wrong only inflicted on the party. (f)

It is sufficient to constitute a conspiracy if two, or more, persons combine, by fraud and false pretences, to injure another, and it is not necessary that the acts agreed to be done should be acts which, if done, would be criminal. It is enough if they are wrongful, *i.e.* amount to a civil wrong. (g)

A fraudulent agreement, by a member of a partnership,

(a) *Mulcahy v. Reg.* L. R. 3 E. & I. App. 306-317-328.

(b) *Horseman v. Reg.* 16 U. C. Q. B. 543; *R. v. Seward*, 1 A. & E. 706; 3 L. J. (M. C.) 103; *R. v. Richardson*, 1 M. & Rob. 402; *R. v. Kenrick*, 5 Q. B. 49; 12 L. J. (M. C.) 135; 3 Russ. Cr. 116.

(c) *Reg. v. Roy*, 11 L. C. J. 92, per *Drummond*, J.

(d) *Ib.*

(e) *Rex. v. Mawbey*, 6 T. R. 636, per *Grose*, J.; 3 Russ. Cr. 116.

(f) *Reg. v. Warburton*, L. R. 1 C. C. R. 276, per *Cockburn*, C. J.; 40 L. J. (M. C.) 22.

(g) *Ib.* 276, per *Cockburn*, C. J.

with third persons, wrongfully to deprive his partner, by false entries, and false documents, of all interest in some of the partnership property, in taking accounts for the division of the property, on the dissolution of the partnership, was held to be a conspiracy, although the offence was completed before the passing of the corresponding English section of the 32 & 33 Vic., c. 21, s. 38, (by which a partner can be criminally convicted for feloniously stealing the partnership property); for the object was, to commit a civil wrong, by fraud and false pretences, and that is a conspiracy. (a)

It appears that an indictment lies not only wherever a conspiracy is entered into for a corrupt or illegal purpose, but also where the conspiracy is to effect a legal purpose by the use of unlawful means, and this although such purpose be not effected (b)

But in an indictment for conspiracy, an offence prohibited by penal law must be set forth either in the averment of the end or means. The indictment ought to shew that the conspiracy was for an unlawful purpose, or to effect a lawful purpose by unlawful means. *Malum prohibitum*, and not *malum in se non prohibitum*, is the only foundation either as to the end or the means, upon which an indictment for conspiracy should rest. (c)

All the definitions of conspiracy shew that the offences of this nature belong to one or other of two classes. The first, where the illegal character of the object constitutes the crime; the second, where the illegal character of the means used to attain the end is the constituent feature of the offence. In the first class of cases, it is unnecessary to state in the indictment the means by which the un-

(a) *Reg. v. Warburton*, L. R. 1 C. C. R. 274.

(b) *Reg. v. Tailor's Cam.* 8 Mod. 11; *Reg. v. Best*, 6 Mod. 185; 3 Russ. Cr. 116.

(c) *Reg. v. Roy*, 11 L. C. J. 89-93, per *Drummond, J.*



lawful end was attained, or sought to be reached; while in the second class, the means, or overt acts, must be specially set forth. (a)

In this case, the object was alleged to be to "cheat and defraud private individuals;" but as this was not necessarily a penal offence, and no penal offence was shewn in the averment of the means used, the indictment was quashed. It was also held that the count should state of what thing or things the defendant intended to defraud the parties. (b)

An indictment, charging that defendants, H., C., and D., were Township Councillors of East Nissouri, and T., Treasurer, that defendants, intending to defraud the *Council* of £300 of the moneys of said Council, falsely, fraudulently, and unlawfully, did combine, conspire, confederate, and agree among themselves, unlawfully and fraudulently to obtain and get into their hands, and did then, in pursuance of such conspiracy, and for the unlawful purpose aforesaid, unlawfully meet together, and fraudulently and unlawfully get into their hands £300 of the moneys of said Council, then being in the hands of said T., as such Treasurer, as aforesaid, was held bad, on writ of error, on the following grounds:—The money in the hands of the Treasurer was, under 12 Vic., c. 81, s. 74, the property of the *Municipal Corporation*, and the intent to defraud should have been laid as an attempt to defraud the latter of its moneys; second, there was nothing to shew what the parties conspired to accomplish; third, the unlawful conspiracy, which is the gist of the offence, was not first sufficiently alleged, and the overt act stated to have been done, in pursuance of it, was not wrong or unlawful; fourth, it was not

(a) *Reg. v. Roy*, 11 L. C. J. 93, per *Drummond. J.*

(b) *Ib.*

alleged that any unlawful means were had in order to get the money into the possession of the Treasurer. (a)

Conspiracy is generally a matter of inference, deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose, in common between them. (b)

Whenever a joint participation in an enterprise is shewn, any act done in furtherance of the common design is evidence against all who were, at any time, concerned in it. (c) It is clearly unnecessary to prove that all the defendants, or any two of them, actually met together, and concerted the proceeding carried out. It is sufficient if the jury are satisfied, from their conduct, and from all the circumstances, that they were acting in concert. (d) But, in general, proof of concert and connection must be given before evidence is admissible of the acts or declarations of any person not in the presence of the prisoner. (e) The prosecutor may go into general evidence of the nature of the conspiracy before he gives evidence to connect the defendant with it. (f)

The prisoners were indicted for conspiring to commit larceny. The evidence was that the two prisoners with another boy were seen by a policeman, to sit together on some door-step near a crowd, and when a well dressed person came up to see what was going on, one of the prisoners made a sign to the others, and two of them got up, and followed the person into the crowd. One of them was seen to lift the tail of the coat of a man as if to ascertain,

(a) *Horseman v. Reg.* 16 U. C. Q. B. 543.

(b) *Mulcahy v. Reg.* L. R. 3 E. & I. App. 317, per *Willes, J.*; *R. v. Brissac*, 4 Ea. 171, per *Grose, J.*

(c) *Reg. v. Slavin*, 17 U. C. C. P. 205; and see *R. v. Shellard*, 9 C. & P. 277; *R. v. Blake*, 6 Q. B. 126; 13 L. J. (M. J.) 131.

(d) *Reg. v. Fellowes*, 19 U. C. Q. B. 48; and see *R. v. Parsons*, 1 W. Bl. 322; *R. v. Murphy*, 8 C. & P. 297.

(e) 3 Russ. Cr. 161; *The Queen's Case*, 2 Brod. & B. 302; *Reg. v. Jacobs*, 1 Cox, C. C. 173; *Reg. v. Duffield*, 5 Cox, C. C. 404.

(f) *R. v. Hammond*, 2 Esp. 718.

if there was anything in his pocket, but making no visible attempt to pick the pocket; and to place a hand against the dress of a woman, but no actual attempt to insert the hand into the pocket was observed. Then they returned to the door-step, and resumed their seats. They repeated this two or three times, but there was no proof of any pre-concert other than this proceeding:—*Held*, not to be sufficient evidence of a conspiracy, for to sustain a charge of conspiracy, there must be evidence of concert to do the illegal act, and the doing of an act, not illegal is no evidence of a conspiracy to do an illegal act, there being no other evidence of the conspiracy than the act so done. (a)

In an indictment for conspiracy to obtain money by false pretences, it is not necessary to set out the pretences, as the gist of the offence is the conspiracy. (b) But where the conspiracy is to obtain money from certain persons, it is necessary to state who they are, for the conspiracy is to cheat them. (c) In a conspiracy to obtain goods, it is not necessary to specify the goods, or describe them, as in an indictment for stealing them, stating them as “divers goods” would be sufficient. (d)

Conspiracy is an offence at common law independently, of the 33 Ed. 1, c. 2. (e) A conspiracy to kidnap is a misdemeanor. (f)

A conspiracy to charge a man falsely with treason felony or misdemeanor is indictable: but it is not an indictable offence for two or more persons to consult and agree to prosecute a person, who is guilty, or against whom there are reasonable grounds of suspicion. (g)

(a) *Reg. v. Taglor*, 8 C. L. J. N. S. 54; 25 L. T. Rep. N. S. 75.

(b) *Reg. v. Macdonald*, 17 U. C. C. P. 638, per A. Wilson, J.; *Rex v. Gill*, B. & Ald. 204.

(c) *Ib.*

(d) *Reg. v. Roy*, 11 L. C. J. 92, per Drummond, J.

(e) *Reg. v. Roy*, 11 L. C. J. 92.

(f) *Ex parte Blossom*, 10 L. C. J. 41 per Badgley, J.

(g) *R. v. Best*, 1 Salk. 174, 2 Ld. Raym. 1167.

A conspiracy to impose pretended wine upon a man, as and for true and good Portugal wine, in exchange for goods is indictable. (a) So a conspiracy to defraud the public by means of a mock auction or an auction with sham bidders, who pretend to be real bidders for the purpose of selling goods at prices grossly above their worth. (b) So a conspiracy by a female servant and a man, whom she got to personate her master, and marry her, in order to defraud her master's relatives of a part of his property, after his death. (c) So a conspiracy to injure a man in his trade or profession; (d) so a conspiracy, by false and fraudulent representations, that a horse bought by one of the defendants from the prosecutor, was unsound, to induce him to accept a less sum for the horse than the agreed price. (e) So a conspiracy to raise the prices of the public funds by false rumours, as being a fraud upon the public; (f) so a conspiracy by persons, to cause themselves to be reputed men of property, in order to defraud tradesmen; (g) so a conspiracy to defraud by means of false representations of the solvency of a bank or other mercantile establishment; (h) so a conspiracy by traders, to dispose of their goods in contemplation of bankruptcy with intent, to defraud their creditors; (i) so a conspiracy to procure the defilement of a girl, (j) or a conspiracy to induce a woman, whether chaste or not, to become a common prostitute. (k)

But an indictment will not lie for a conspiracy to com-

- (a) *R. v. Macarty*, 2 *Ld. Raym.* 1179.
- (b) *R. v. Lewis*, 11 *Cox*, 404. per *Willes*, J.
- (c) *R. v. Taylor*, 1 *Leach*, 47.
- (d) *R. v. Eccles*, 1 *Leach*, 274.
- (e) *R. v. Carlile*, 23 *L. J. (M. C.)* 109.
- (f) *Rex v. De Berenger*, 3 *M. & S.* 67.
- (g) *R. v. Roberts*, 1 *Camp.* 399.
- (h) *R. v. Esdaile*, 1 *F. & F.* 213.
- (i) *R. v. Hall*, 1 *F. & F.* 33.
- (j) *R. v. Mears*, 2 *Den.* 79; 20 *L. J. (M. C.)* 59.
- (k) *R. v. Howell*, 4 *F. & F.* 160.

mit a mere civil trespass, (a) or for a conspiracy to deprive a man of an office under an illegal trading company. (b)

If, however, the parties conspire to obtain money by false pretences of existing facts, it seems to be no objection to the indictment for conspiracy that the money was to be obtained through the medium of a *contract*. (c) A conspiracy to commit a felony or misdemeanor is indictable. (d)

Even, before the 32 & 33 Vic., c. 29, s. 50, although the evidence, in support of an indictment for conspiracy, shewed its object to have been felonious, or, even, that a felony was actually committed in the course of it, the defendants were not entitled to an acquittal on the ground that the misdemeanor had merged in the felony; nor was, or is it, any ground for arresting the judgment, that, on the face of the indictment itself, the object of the conspiracy amounts to a felony, the gist of the offence charged being a conspiracy. (e)

From the very nature of conspiracy, it must be between two persons at least, and one cannot be convicted of it, unless he has been indicted for conspiring with persons to the jury unknown. (f) A man and his wife cannot be indicted for conspiring alone, because they constitute one person in law. (g)

But one person alone may be tried for a conspiracy, provided the indictment charged him with conspiring with others who have not appeared, (h) or who are since dead. (i)

(a) *R. v. Turner*, 13 Ea. 228.

(b) *R. v. Stratton*, 1 Camp. 549 n.

(c) *R. v. Kenrick*, 5 Q. B. 49; Dav. & M. 208; 12 L. J. (M. C.) 135.

(d) *R. v. Pollman*, 2 Camp, 229 n.; Arch. Cr. Pldg. 938-9.

(e) *Reg. v. Button*, 11 Q. B. 929; 18 L. J. (M. C.) 19; *R. v. Neale*, 1 Den. 36, 1 C. & K. 591.

(f) Arch. Cr. Pldg. 942.

(g) *Ib.*

(h) *R. v. Kinnersley*, 1 Str. 193.

(i) *R. v. Nicholls*, 2 Str. 1227.

Where the indictment charged that A. B., and C. conspired together, and with divers other persons to the jurors unknown, etc., and the jury found that A. had conspired with either B. or C., but they could not say which, and there was no evidence against any other persons than the three defendants, A. was held entitled to an acquittal. (a)

(a) *R. v. Thompson*, 16 Q. B. 832; 20 L. J. (M. C.) 183; Arch. Cr. Pldg. 942.

## CHAPTER VII.

## ANNOTATIONS OF MISCELLANEOUS STATUTES.

It is a sound rule to construe a statute according to the common law rather than against it, except, when or so far as the Statute is plainly intended to alter the common law. (a)

Statutes are usually construed strictly in criminal cases, and no construction will be adopted, which the language of the Statute does not plainly authorize. (b)

But they are taken strictly, and literally only, in the point of defining and setting down the crime and the punishment, and not generally in words that are but circumstance and conveyance in putting the case. (c)

It has been laid down that the Court will construe a penal Statute according to its spirit, and the principles of natural justice; and cases may possibly arise in which, although a person, according to the letter of the Act, may be liable to the penalty; yet the Court will direct the jury to acquit him, he not having offended against its spirit and intention. (d)

By 31 Vic., c. 1, s. 6, thirty ninthly, every Act shall be deemed remedial, and shall be construed as such. In construing a remedial Statute, the substance of its provisions must be looked to, (e) and the Court will construe it liberally. (f)

(a) *Reg. v. Morris*, L. R. 1 C. C. R. 95, per *Byles*, J.

(b) See *Reg. v. O'Brien*, 13 U. C. Q. B. 436; see also *Reg. v. Brown*, 4 U. C. Q. B. 149, per *Robinson*, C. J.; *Wilt v. Lai*, 7 U. C. Q. B. 537, per *Robinson*, C. J.

(c) *Dwarris*, 634.

(d) *Atty. Genl. v. Mackintosh*, 2 U. C. Q. B. O. S. 497.

(e) *Reg. v. Proud*, L. R. 1 C. C. R. 74, per *Kelly*, C. B.

(f) *M'Farlane v. Lindsay*, *Draper*, 142; *Dwarris*, 614.

In construing the Consolidated Statutes of Canada, the Court may refer to the original enactments, in order to arrive at a right conclusion. (a) No man can be deprived of any right or privilege, under any statutory enactment, by mere inference, or by any reasons founded solely upon convenience or inconvenience. Statutes are to be construed in reference to the principles of the common law, or of the law in existence at the time of their enactment. It is not to be presumed that the Legislature intended to make any innovation upon the common or then existent law, further than the case absolutely required; and Judges must not put upon the provisions of a Statute a construction not supported by the words. (b)

The Court will not put an interpretation upon an Act to give it a retrospective effect, so as to deprive a man of his right. (c) In general, the Court will not ascribe retrospective force to new laws affecting rights, unless, by express words or necessary implication, it appears that such was the intention of the Legislature. (d)

But the Court cannot refuse to give effect to an *ex post facto* Statute, which is clearly so in its terms. (e) A prisoner is liable to be indicted, on the 29 & 30 Vic., c. 2 and 3, for unlawfully invading Quebec on a day antecedent to the passing of the Statute. (f)

In construing an Act of Parliament, as in construing a deed or a contract, we must read the words in their ordinary sense, and not depart from it, unless it is perfectly clear, from the context, that a different sense ought to be put on them. (g) A Statute must be taken as it is,

(a) *Whelan v. Reg.* 28 U. C. Q. B. 108.

(b) *Reg. v. Vonhoff*, 10 L. C. J. 293, per *Drummond*, J.

(c) *Atty. Genl. v. Halliday*, 26 U. C. Q. B. 414, per *Draper*, C. J.; *Evans v. Williams*, 11 Jur. N. S. 256.

(d) *Phillips v. Eyre*, L. R. 6 Q. B. 23, per *Willes*, J.

(e) *Reg. v. Madden*, 10 L. C. J. 342.

(f) *Ib.*

(g) *Reg. v. Chandler*, 1 Hannay, 551, per *Ritchie*, C. J.



and when its object is to protect public interests, its clauses must be received in that light. (a) A statutory enactment should be so construed as to make the remedy co-extensive with the mischief it is intended to prevent. (b)

Where two Statutes are in *pari materia*, and by the enactments of the latter Statute expressly connected together, they are to be taken as one Act. (c) And even when a Statute refers to another, which is repealed, the words of the latter Act must still be considered as if introduced into the former Statute. (d)

In general, an affirmative Statute does not alter the common law. (e)

Where general words follow particular ones, the rule is to construe them as applicable to persons *ejusdem generis*. (f) In accordance with this principle, the words "or other persons whatsoever," in the Con. Stats. U. C., c. 104, s. 1, cannot be taken to include all persons doing anything whatever on a Sunday, but must be taken to apply to persons following some particular calling of the same description as those mentioned. (g) There can be no estoppel against an Act of Parliament. If the transaction contravening the Act be in reality illegal, no writing or form of contract, or colour given, can prevent an inquiry into the actual facts. (h) It would seem that the principle of estoppel does not apply as against the public interest. (i)

(a) *Reg. v. Patton*, 13 L. C. R. 316, per *Mondelet*, J.

(b) *Reg. v. Allen*, L. R. 1 C. C. R. 375, per *Cockburn*, C. J.

(c) *Reg. v. Beveridge*, 1 Kerr, 68, per *Chipman*, C. J.

(d) *Dwarris*, 571.

(e) *Dwarris*, 473-4, and see *Levinger v. Reg.* L. R. 3 P. C. App. 282.

(f) *Sandiman v. Breach*, 7 B. & C. 100.

(g) *Hespeler and Shaw*, 16 U. C. Q. B. 104, per *Robinson*, C. J.; see also *Reg. v. Hynes*, 13 U. C. Q. B. 194; *Reg. v. Sylvester*, 33 L. J. (M. C.) 79; *Reg. v. Tinning*, 11 U. C. Q. B. 636; *Reg. v. Armstrong*, 20 U. C. Q. B. 245; *ante*, p. 325-6.

(h) *Battersbey v. Odell*, 23 U. C. Q. B. 482.

(i) See *Reg. v. Ewing*, 21 U. C. Q. B. 523.

It is a general rule, that subsequent Statutes, which add accumulative penalties, and institute new methods of proceeding, do not repeal former penalties and methods of proceeding, ordained by preceding Statutes, without negative words. Nor has a later Act of Parliament ever been construed to repeal a prior Act, unless there be a contrariety or repugnancy in them. (a)

In *Foster's* case, (b) it was held that the law does not favour a repeal by implication, unless the repugnance be very plain. A subsequent Act, which can be reconciled with a former Act, shall not be a repeal of it, though there be negative words. The 1 & 2 Ph. & M., c. 10, that all trials for treason shall be according to the course of the common law, and not otherwise, does not take away 35 Hy. 8, c. 2, for trial of treason beyond sea. (c)

The rule is, *leges posteriores priores contrarias abrogant*. If both Statutes be in the affirmative, they may both stand; but if the one be a negative, and the other an affirmative, or if they differ in matter, although affirmative, the last shall repeal the first. So, if there be a "contrariety in respect of the form prescribed," a repeal will also be effected. (d)

The 31 Vic., c. 14, seems now to be the governing enactment, protecting the inhabitants of Canada against lawless aggressions from subjects of foreign countries at peace with Her Majesty. It extends the 3 Vic., c. 12, (e) and the 29 & 30 Vic., cs. 2, 3, and 4, respectively, to the whole of Canada. (f)

The Imp. Stat. 11 & 12 Vic., c. 12, did not override the

(a) Dwarria, 532-3.

(b) 11 Rep. 63.

(c) *Reg. v. Sherman*, 17 U. C. C. P. 168, per *J. Wilson, J.*

(d) See *O'Flaherty v. M'Dowell*, 4 Jur. N. S. 33; *Reg. v. Sherman, supra*, 170, per *A. Wilson, J.*

(e) Con. Stats. U. C. C. 98.

(f) See also the 31 Vic., c. 16, and 33 Vic., c. 1.

3 Vic., c. 12, (a) for the latter was re-enacted by the consolidation of the Statutes, which took place in 1859, and is, therefore, later in point of time than the Imp. Statute. (b)

The prisoner was convicted, upon an indictment under Con Stats. U. C., c. 98, s. 1, containing three counts, each charging him as a citizen of the United States, the first count alleging that he unlawfully and feloniously entered Upper Canada, with intent to levy war against Her Majesty; the second, that he was in arms within Upper Canada, with the same intent; the third, that he committed an act of hostility therein, by assaulting certain of Her Majesty's subjects, with the same intent. The prisoner's own statement, on which the Crown rested, was, that he was a Roman Catholic priest, born in Ireland, and was a citizen of the United States. It was contended, on moving for a rule *nisi* for a new trial, that, on the prisoner's own statement, which the Crown had made their only evidence on the point, and were, therefore, bound to accept as true, he was a British subject; that the additional statement made by the prisoner, that he was a citizen of the United States, though equally true, could not affect the legal consequences of the first, for the native allegiance, of necessity, was the earliest attaching from his birth: that the prisoner could never relieve himself from the duties and obligations of native allegiance, and, therefore, he violated our laws as a British subject, and not as a "citizen or subject of any foreign state or country," and, consequently, was not liable to be convicted under the Statute. But it was held that, although he was born in the British dominions, he might become amenable to the provisions of

(a) *Reg. v. School*, 26 U. C. Q. B. 212.

(b) *Reg. v. Slavin*, 17 U. C. C. P. 205.

the Act, by becoming a naturalized subject of a foreign state; and his own declaration was evidence of that fact, and was precisely of the same force and character as that of his being a natural born subject of Great Britain. The Court further considered, that, though the natural allegiance of the prisoner continued as it is, "a debt of gratitude, which cannot be forfeited, cancelled, or altered, by any change of time, place, or circumstance," yet, as the prisoner had committed a most flagrant breach of duty as a subject, and distinctly repudiated that relation, and asserted a *status* entirely at variance with it, there was no obligation on the part of the Sovereign to recognize the relation of subject as still continuing; but the prisoner might, at the option of the Crown, be treated as a naturalized citizen of a foreign state. (a)

Another important case on the construction of this Statute is that of *Reg. v. Lynch*. (b) In this case, the charge was the same as in the last; but it differed from it chiefly in the fact that, after it was proved for the prosecution that the prisoner had declared himself, on at least two occasions since his arrest, in writing, to be an American citizen, and that he came to Canada as such, his counsel called a witness on his behalf, who proved that he was born within the Queen's allegiance. It was held, that, although, where a person is born within the Queen's dominions, the rule is, "once a British subject, always one," yet the Crown might waive the right of allegiance, and try him as an American citizen, which he claimed to be.

If the prisoner appeared clearly to be a British subject, and there was no evidence that he was an American citizen, he would still be indictable under our statute

(a) *Reg. v. M'Mahon*, 26 U. C. Q. B. 195.

(b) 26 U. C. Q. B. 208.

law for substantially the same felony, with some variation of statement. (a)

His offence in such case, would partake of the nature of treason, and where the Crown has a right to deal with a party as a traitor, they may proceed against him as guilty only of felony. (b)

The prisoner having been indicted, under Con. Stats., U. C., c. 98, as a citizen, of the United States of America, was convicted of having, as such, joined himself to divers other evil disposed persons, and having been unlawfully and feloniously in arms against the Queen, within Upper Canada, with intent to levy war against Her Majesty. It was sworn the prisoner had said he was an American citizen, and had been in the American army, and there was no evidence offered to contradict this, and the Court held it evidence against the prisoner as his own admissions, and declarations of the country to which he belonged. (c)

At an early hour, on the first of June, 1866, about eight hundred men landed at Fort Erie, in arms, coming in canal boats towed by tugs, the inference being irresistibly that they came from the United States. The prisoner was seen among them, armed with a revolver. The Canadian volunteers in uniform were attacked at Lime Ridge by these men, who were called Fenians, and some were killed and wounded. The prisoner was within half a mile of the battle field, and attended the wants of the wounded on both sides, and heard the confession of five wounded Fenians. On the day before, the prisoner was talking with the Fenians in their camp, two or three being then officers, and seemed friendly with them. When the Fenians moved, on that day, from their camp,

(a) See 31 Vic., c. 14, s. 3; *Reg. v. Lynch*, 26 U. C. Q. B. 211.

(b) *Reg. v. M'Mahon*, 26 U. C. Q. B. 201.

(c) *Reg. v. Slavin*, 17 U. C. C. P. 205.

some of them left their valises behind, and the prisoner said "Pick up the valises, the boys may want them, we do not know how long we may stay in Canada." The men picked up the valises, and the prisoner followed them. He spoke to the men, and told them to take care of themselves and said to some bystanders: "Don't be afraid, we do not want to hurt civilians." Some one said they wanted to see red coats, and the prisoner said "yes; that was what they wanted." It was held that these facts were sufficient to go to the jury, to establish that the Fenians entered the Province, with intent to levy war against the Queen, and that the prisoner was connected with them, and consequently involved in their guilt. It was also held that even, if he carried no arms, on which the evidence was not uniform, being joined with, and part, of an armed body, which had entered Ontario from the United States, and attacked the Canadian volunteers, he would be guilty of their acts of hostility, and of their intent; and that, if he was there to sanction with his presence, as a clergyman, what the rest were doing, he was in arms as much as those who were actually armed. (a)

It was proved that a large body of invaders landed from the American side of the river. They were armed with rifles and bayonets, marched in order and had officers with them, some in uniform and some in plain clothes with green flags, with harps and drums. They took prisoners, and confined them. They said they were going to take Canada, and have farms. Two fights took place with the Queen's troops at Fort Erie, and near Ridgway, and men were killed on both sides. The prisoner was identified as one of the invaders. The prisoner asserted that he came over with the invaders as reporter

(a) *Reg. v. M'Mahon*, 26 U. C. Q. B. 195.

only, but it was held that this could form no defence for there was a common unlawful purpose, and the presence of any one, *in any character*, aiding and abetting or encouraging the prosecution of the unlawful design, must involve a share in the common guilt. The facts above stated, were held evidence of an intent to levy war.

The fact of the invaders coming from the United States, would be *prima facie* evidence of their, being citizens or subjects thereof. (a)

Where it was proved that several hundreds of armed men landed in this Province from the United States of America; that, very shortly afterwards, the prisoner came from the same place; that he was with them all the night, previous to an attack made by them on the Canadian volunteers, and was, early in the morning, on which the attack was made, seen carrying a rifle and bayonet, similar to those carried by the invaders, and altogether different from those used by Her Majesty's troops: it was also shewn that this armed body was organized; that it encamped and marched in military order; that it took prisoners, engaged Her Majesty's troops, and killed several of them:—*Held*, evidence of an intent, on the part of the prisoner, to levy war against Her Majesty the Queen, and that this intent, as laid down in *Frosts* case, (b) may be collected from the acts of the accused, the *bellum percussum* of the body, with which he is identified, and does not require the passing of a resolution, or a verbal, or written declaration, plainly expressive of a purpose to levy war. (c) In this case, it was further proved that the prisoner was in arms, at Fort Erie, in Ontario, at four o'clock, in the morning of the attack made upon the volunteers, and that he had been there with the

(a) *Reg. v. Lynch*, 26 U. C. Q. B. 208; and see *Reg. v. School*, *ib.*, 214.

(b) 9 C. & P. 150.

(c) *Reg. v. Slavin*, 17 U. C. C. P. 205.

armed enemy the night before :—*Held*, evidence that he was in arms, in Upper Canada, with intent to levy war, notwithstanding his statement that he had found the weapons, with which he was armed, upon the road, and the fact that there was evidence of his having been unarmed the night before.

It is not necessary, in order to render a party amenable to the Statute, that he should actually have arms upon his person ; it is quite sufficient that he is present, and concerned with those who are armed, even, though he do not carry arms himself ; for all who are present at the commission of the offence are principals, and are alike culpable in law. (a)

In this case, evidence was admitted, against the prisoner, of the engagement above alluded to, although the same took place several hours after his arrest :—*Held*, that the evidence had been properly received, as shewing, to some extent, that the engagement in question had been contemplated by the parties, while the prisoner was with them before his arrest.

In *Reg. v. School*, (b) the prisoner was indicted in two sets of counts, one charging him as a citizen of the United States, the other as a subject of Her Majesty ; but the *corpus delicti* in all the counts was the same, *viz.* the levying of war or intent to do so.—It was contended on the trial that the Crown should elect on which set of counts it would proceed ; on the ground that the prisoner was thereby forced to defend himself against two distinct offences, and was thereby embarrassed in his defence ; but the Judge refused to call upon the Crown to elect, and the Court confirmed his ruling ; it would seem on the ground that the *corpus delicti* and the overt acts

(a) *Reg. v. Slavin*, 17 U. C. C. P. 205.

(b) 26 U. C. Q. B. 212.



constituting it, as alleged in all the counts, were the same, and the difference in statement was only to meet the evidence.

The third section of the Con. Stats., U. C., c. 98, as amended by the the 29 & 30 Vic., c. 4, is as follows, "every subject of Her Majesty, and every citizen or subject of any foreign state or country, who has, at any time heretofore, offended, or may, at any time hereafter offend against the provisions of this Act is, and shall be, held to be guilty of felony, and may, notwithstanding the provisions hereinbefore contained, be prosecuted, and tried before any Court of *Oyer and Terminer*, and General Gaol delivery in, and for, any county, in Upper Canada, in the same manner as if the offence had been committed in such county, and, upon such conviction, shall suffer death as a felon." The prisoner being indicted under this section, and charged as a citizen of the United States, was acquitted on proving himself to be a British subject. He was then indicted under the same section as a subject of Her Majesty, and pleaded *autrefois acquit*. It was held that the plea was not proved; for by this section the offence, in the case of a foreigner, and a subject, is substantially different, and that the section intended to preserve a distinction between the offences committed by a foreigner and a subject of Her Majesty; that, when the prisoner was charged as a British subject, the Act, (in the second section) required proof, not only of the *status* as such subject, but also of the joining with foreigners in the commission of it, and the same evidence, irrespective of national *status*, which would convict the foreigner, would not convict the subject, and the prisoner, therefore, was not in legal peril on the first indictment. (a)

Under s. 11, of the 28 Vic., c. 1, for repressing outrages

(a) *Reg. v. Magrath*, 26 U. C. Q. B. 385.

on the frontier, the Court can only order restoration of property seized, when it appears that the seizure was not authorized by the Act. (a) On the facts of this case, they refused to interfere, holding that the collector, who seized, had probable cause for believing that the vessel was intended to be employed in the manner pointed out by the ninth section. (b)

It would seem that the 32 & 33 Vic., c. 29, regulating the procedure in criminal cases, is not limited to felonies or offences existing at the time of the passing of the Statute, but applies to offences created by subsequent Statutes, and establishes a general rule of practice and procedure, in all cases that may come before the Court for adjudication, for it would appear that a Statute affecting procedure is not restricted to offences actually committed at the time of its coming into operation. (c) At all events, the (N. B.) Rev. Stats. c. 159, s. 16, by which, on a trial for felony, the jury is authorized to acquit of the felony, and find a verdict of guilty of misdemeanor if the evidence warrants it, applies, as a rule of procedure, to all criminal cases, and is not confined to felonies existing at the time of the passing of the Statute. Therefore, on an indictment for a felonious assault, under the Act 25 Vic., c. 10, passed subsequent to the revised Statute, the prisoner may be found guilty of an assault only. (d)

The 32 & 32 Vic., c. 20, s. 26, provides that whosoever unlawfully abandons or exposes any child, being under the age of two years, whereby the life of such child is endangered, or the health of such child has been, or is likely to be, permanently injured, is guilty of a misdemeanor.

(a) *Re Georgian*, 25 U. C. Q. B. 319.

(b) *Ib.*

(c) See *Reg. v. Ryan*, 1 Hannay, 116.

(d) *Ib.*

As this Statute uses the word "unlawfully," it would seem that it only applies to persons on whom the law casts the obligation of maintaining and protecting the child, and makes this a duty. A person who has the lawful custody and possession of the child, or the father who is legally bound to provide for it, may offend against the provisions of the Statute. But where two persons, strangers to the child, were indicted under this clause, the Court held they were entitled to an acquittal. (a)

It would seem, also, if the child dies the clause does not apply, but the prisoner would be guilty of murder or manslaughter, according to the circumstances. (b)

A woman who was living apart from her husband, and who had the actual custody of their child under two years of age, brought the child, on the 19th of October, and left it at the father's door, telling him she had done so. He knowingly allowed it to remain lying outside his door, and subsequently in the roadway, from about 7, P. M., till 1, A. M., when it was removed by a constable, the child then being cold and stiff but not dead—*Held*, that, though the father had not had the actual custody and possession of the child, yet, as he was by law bound to provide for it, his allowing it to remain where he did was an abandonment and exposure of the child by him, whereby its life was endangered, within the meaning of the corresponding English section of 32 & 33 Vic., c. 20, s. 26. (c)

A. and B. were indicted, for that they did abandon and expose a certain child, then being under the age of two years, whereby the life of the child was endangered." A., the mother of a child five weeks old, and B. put the child into a hamper, wrapped up in a shawl, and packed

(a) *Reg. v. White*, L. R. 1 C. C. R. 311.

(b) See *ib.* 314, per *Blackburn*, J.

(c) *Reg. v. White*, L. R. 1 C. C. R. 311.

with shavings and cotton-wool, and A., with the connivance of B., took the hamper to M., about four or five miles off, to the booking-office of the railway station there. She there paid for the carriage of the hamper, and told the clerk to be very careful of it, and to send it to G. by the next train, which would leave M. in ten minutes from that time. She said nothing as to the contents of the hamper, which was addressed, "Mr. Carr's, Northoutgate, Gisbro. With care, to be delivered immediately," at which address the father of the child was then living. The hamper was carried by the ordinary passenger train from M. to G., leaving M. at 7.45, and arriving at G. at 8.15, P.M. At 8.40, P.M., the hamper was delivered at its address. The child died three weeks afterwards from causes not attributable to the conduct of the prisoners. On proof of these facts at the trial, it was objected, for the prisoners, that there was no evidence to go to the jury that the life of the child was endangered, and that there was no abandonment and exposure of the child, within the meaning of the Statute. The objections were overruled, and the prisoners found guilty :—*Held*, by a majority of the fifteen Judges, that the conviction should be affirmed. (a)

The 32 & 33 Vic., c. 32, contains provisions respecting the prompt and summary administration of criminal justice, in certain cases. It repeals and substantially re-enacts the provisions of the former Statute, Con. Stat. C., c. 105, so that the decisions under the old will equally apply to the new Act.

The prisoner was convicted, by the Police Magistrate for the City of Toronto, for that she "did on," etc., "at the said City of Toronto, keep a common disorderly bawdy house on Queen Street, in the said City," etc., and

(a) *Reg. v. Falkingham*, L. R. 1 C. C. R. 222.

and committed to gaol, at hard labour, for six months. A *habeas corpus* and *certiorari* issued, in return to which the commitment, conviction, information, and depositions were brought up, On application for her discharge, no motion being made to quash the conviction :—*Held*,

(1). No objection that the commitment stated the offence to have been committed on the 11th of August, instead of the 10th, as in the conviction, the variance not being material to the merits, and the Court, not being able to go behind the return and commitment which it set forth.

(2) Nor that the commitment charged that the prisoner “was the keeper of,” and the conviction “that she did keep,” both differing from the Statute, which designates the offence as “keeping any disorderly house,” etc., for it would seem the Court could not go behind the commitment, and all these expressions conveyed but one idea.

(3) Nor that the commitment did not shew that the offence was committed within the “Police limits” of the city, the words used in the Act; for the limits of the City of Toronto were assigned by a public Statute, and the Municipal Institutions Act, creating the Police Court and Magistrate, and the whole body of police, contains nothing to shew that there are any police limits differing from the ordinary city limits.

(4) Nor that the commitment did not follow the form of conviction given in the Statute, in shewing that the party was *charged* before the convicting magistrate, *i. e.*, charged as the Statute required, namely put upon her trial, and asked whether she was guilty or not guilty, nor whether she pleaded to the charge or confessed it. It might, and probably would, be a defect in the *conviction* if it did not pursue the statutory form, in shewing

that the party was charged, more especially as, by the second section of the Act, the jurisdiction is made to depend upon the fact of the party being charged before the convicting Justice. That point, however, was not decided, the Court merely intimating that it might or might not be a defect in the conviction. Unless the commitment must contain all that the conviction does or ought to contain, it is unnecessary to state the information in it, and the more especially as, by the form given by the Statute, it does not appear necessary that the information should be set out in the conviction.

(5) Nor that the conviction was not sustained by the information, the latter being that defendant was the keeper of a well-known disorderly house, and the former, that the prisoner did keep a common disorderly bawdy house, for the commitment would not be void on the face of it because of a variance between the original information and the conviction, made after hearing evidence. But if the prisoner had been charged with the information, and, on being called on to answer, had confessed the information, and then had been convicted of matter not contained in the information, no doubt the conviction could be quashed; but, even in that case, while it stood unreversed, it would warrant a commitment following its terms.

(6) Nor that no notice had been put up, as required by s. 25 (a) of the same Act, to shew that the Court was that of a Police Magistrate, not of an ordinary Justice of the Peace, for the jurisdiction, in the absence of express enactment, could not be made to depend on the omission of the Clerk to post up such notice. It was contended this notice was necessary, as it was alleged more power is conferred upon the Police Magistrate under this Act

than ordinarily belongs to a person administering justice in that capacity, inasmuch as the Con. Stats. U. C., c. 54, s. 369, (a) enables any ordinary Justice of the Peace, on the requisition of the Mayor, to act in the Police Office of a city, and dispose of ordinary business.

(7) Nor that the evidence was unsatisfactory and insufficient to warrant the conviction, for when a proper commitment is returned to a *Habeas Corpus*, and there was evidence, the Court will never enter into the question, whether the Magistrate has drawn the right conclusion from it.

(8) Nor that the offence of "keeping a common disorderly bawdy house" was not sufficiently certain for the legal meaning of the last two words is clear, and a house will not be less a public nuisance because it is found to be disorderly as well as bawdy, and if keeping a disorderly house be no offence, the term becomes mere surplusage, and would not vitiate an otherwise sufficient statement. But the Statute does give jurisdiction over persons charged with keeping any *disorderly house*, house of ill-fame, or bawdy house. (b)

In a case of this kind, affidavits are receivable upon the question, whether the Magistrate had jurisdiction or no, and an affidavit stating the non-compliance with the requirements of s. 25 was received, though offered with a view to shew that the Magistrate had not jurisdiction; but it would seem affidavits are not receivable to sustain objections as to the conduct of the Magistrate in dealing with the case before him. (c)

On an application for a writ of *Habeas Corpus* at common law, it seems affidavits may be received, but not if

(a) Now 29 & 30 Vic., c. 51, s. 367.

(b) *Reg. v. Munro*, 24 U. C. Q. B. 44.

(c) *Ib.* 53, per *Draper*, C. J.

the writ is applied for under the Statute of Charles, (a) for it confers no power to receive them.

Affidavits might, perhaps, be received that no such sentence passed, but not to impeach it; and also as to matter of fact, but not of law. (b)

When the Court cannot get at the want of jurisdiction but by affidavit, it must, of necessity, be received, as if the charge were insufficient, and the Magistrate mis-stated it in drawing up the proceedings, so that they appeared regular. (c) It would seem that a Judge of the Superior Court could not, on *habeas corpus*, enquire into the conclusion at which the Magistrate, acting under this Statute, has arrived, provided he had jurisdiction over the offence charged, and had issued a proper warrant upon that charge; but it seems the Judge might enquire into what that charge was, or whether there was a charge at all. (d)

Under s. 3 of this Act the Magistrate may, before any formal examination of witnesses, ascertain the nature and extent of the charge, and, if the party consents to be tried summarily, may reduce it into writing. It would seem that the Magistrate may then (that is, when a person is charged before him, prior to the formal examination of witnesses) reduce the charge into writing, and try the party upon the charge thus reduced to writing; and, if this is the meaning of the Statute, it would not signify whether the original information and warrant to apprehend did or did not state a charge, in the precise language of the Act. (e) But the Magistrate must, either by the original information, or by the charge which he makes when the party is before him, have the charge in

(a) 31 Car. 2, c 2.

(b) *Re McKinnon*, 2 U. C. L. J. N. S. 327, per A. Wilson, J.

(c) *Ib.* 327, per A. Wilson, J.

(d) *Ib.* 328, per A. Wilson, J.

(e) *Ib.* 329, per A. Wilson, J.



writing, and must read it to the prisoner, and ask him whether he is guilty or not. (a)

It appeared, on an application for a *habeas corpus*, that the information laid before a Police Magistrate, and warrant to apprehend, were for an assaulting and beating, but it was disputed whether, upon the examination and trial, this was *all* the charge made, or whether he was not then charged with an aggravated assault, under Con. Stats. Can., c. 105, s. 1, ss. 4, and whether, when he pleaded guilty, he did so under the former or the latter charge.

The information seemed to be laid under Con. Stats. Can., c. 91, ss. 37 and 38, for an assault and beating, while the conviction purported to be under Con. Stats. Can., c. 105, (b) and imposed the punishment prescribed by the latter Statute. Numerous contradictory affidavits were filed, the Justice alleging that the defendant was charged with an aggravated assault, and, with full knowledge of the fact, consented to the charge being summarily disposed of by the Justice, according to the Statute, while the defendant contradicted this, and alleged that he would not have pleaded guilty if he had known the charge was of aggravated assault. Four several warrants of commitment were in the Gaoler's hands, upon one, at least, of which the prisoner was detained in custody. They were all for the same offence, one having been, from time to time, substituted for the other:—*Held*, that a charge of assaulting and beating is not a *charge* of aggravated assault, and a complaint of the former will not sustain a conviction of the latter, under 32 & 33 Vic., c. 32, though, when the party is before the Magistrate, the charge of aggravated assault may be made in writing,

(a) *Re McKinnon*, 2 U. C. L. J. N. S. 329. per A. Wilson, J.

(b) 32 & 33 Vic., c. 32.

and followed by a conviction therefor. Under doubts as to the law and the power to receive affidavits on the disputed facts, the prisoner was admitted to bail, pending the application for his discharge, which was to be renewed in term. (a)

The Con. Stats, U. C., c. 76, (b) contain provisions respecting apprentices and minors.

Where the defendant, a Justice of the Peace, convicted one R., an apprentice, of having absented himself from his master's service without leave, and adjudged that he should give sufficient security to make satisfaction to his master, according to the Statute, and, in default of such satisfaction, be imprisoned in the Common Gaol for two months, unless the said satisfaction should be sooner given. The conviction was quashed—first, because the articles of apprenticeship were not within the Act, for it appeared that the apprentice was a minor, and the articles were not executed by any one on his behalf, and, secondly, because it could not be sustained under the 10th clause of the Con. Stat. for *two* months' imprisonment, or under the 11th clause, because the satisfaction to be given was not ascertained, and, as it was not ascertained, it amounted to an absolute imprisonment for two months, which was not authorized by the Statute. (c)

The Con. Stats. U. C., c. 75, consolidates the various enactments respecting master and servant. This Act has been amended by the 29 Vic., c. 33. The Act does not apply to the case of school trustees and school teachers, and if a trustee is convicted under it, as a master, the conviction will be quashed. (d)

A. engaged B. and his hired man, C., to build a house

(a) *Re M'Kinnon*, 2 U. C. L. J. N. S. 324.

(b) 14 & 15 Vic., c. 11.

(c) *Reg. v. Robertson*, 11 U. C. Q. B. 621.

(d) *Re Joice*, 19 U. C. Q. B. 197.

for him, and agreed to pay B. his ordinary wages, and \$1 per diem for C. A., making default, was convicted before a Magistrate under the Act, and ordered to pay B. \$15.50 for C.'s services. A. appealed, but the appeal was adjourned to another sessions, when the conviction was quashed. B. then obtained a summons to shew cause why a *certiorari* should not issue, to return the order quashing the conviction into the Queen's Bench :—*Held*, that the applicant had a right to a *certiorari*; but it would seem that the proceedings to reinstate the conviction were unnecessary under the circumstances, for, admitting that the Superior Court should quash the order on any ground, the conviction must still rest on its own merits, and it did not clearly appear that the case was within the Act:—*Held*, also, that the agreement referred to did not come within the second branch of the Con. Stats. s. 3. It would seem, also, that the terms used in the first branch of this section refer to agreements where master, journeymen and labourers belong to the same calling, and one engages the other to work for him in its exercise. (a)

A conviction of a servant for absenting himself from his master's employment does not determine the contract of service. (b)

A workman entered into a contract with a master to serve him for the term of two years; he absented himself, during the continuance of the contract, from his master's service, and, under 4 Geo. 4., c. 34, s. 8, he was summoned before Justices, convicted and committed to prison. After the imprisonment had expired, and while the term still continued, he refused to return to his master's service, and was again summoned before Justices,

(a) *Re Doyle*, 4 U. C. P. R. 32; as to a hiring within the second branch of this section, see *Reg. v. Walker*, 21 U. C. Q. B. 34.

(b) *Unwin and Clark*, L. R. 1 Q. B. 417.

when he stated he considered his contract determined by the commitment. The Justices found that he, *bona fide*, believed that he could not be compelled to return to his employment, and dismissed the summons. The question for the opinion of the Court was whether the Justices had power to commit the respondent to prison a second time:—*Held*, that, although the servant had not returned to the service, yet, as the contract continued, he had been guilty of a fresh offence, for which, notwithstanding his conviction and imprisonment, he could be convicted a second time, and that his *bona fide* belief that he was not legally liable to return to the service, being a mistake in law, did not constitute a valid excuse for his absence. (a)

A conviction under the Con. Stats., c. 75, must shew that the person, against whom the complaint is lodged, was a servant at the time of the conviction or order; that the complaint was upon oath, and in what manner the wages are due. (b)

The Con. Stats. U. C., c. 49, s. 43, *et seq.* provides for the establishment and regulation of tolls, on roads constructed by joint stock companies.

The offence created and contemplated by the Statute is the exacting and taking a sum over and above the amount of toll which the collector is authorized to take. Section 89 of this Statute, which makes it an offence to “take a greater toll than is authorized by law,” does not apply to the case of taking toll from a person who is altogether exempt. If it did, a conviction for such offence should state the ground of exemption, and the fact of exemption being claimed, so that the Court could see that an offence was committed.

Where a person passed through the gate on the 10th of

(a) *Unwin and Clark*, L. R. 1 Q. B. 417.

(b) *Helps and Eno*, 9 U. C. L. J. 302.

January, the collector giving him credit, as was usual between them, and on the 20th they had a settlement, and the toll for the 10th was then demanded and paid, *semble*, that a conviction for such demand, if illegal, could not be supported. (a)

Section 91, ss. 7, exempts any person, with horse or carriage, going to, or returning from, his usual place of religious worship, on the Lord's Day.

If a minister attends church, according to the usage prescribed and observed by the rules of the particular persuasion to which he belongs, such church may be considered, as to him, the usual place of religious worship when he is attending it, on the day so prescribed. (b)

A waggon of the seller carrying artificial manure to the farm of the purchaser, is within the exemption from toll, in the 5 & 6 Wm. 4, c. 18, s. 1, as "a carriage employed in conveying manure for land. (c)

The following conviction before the Magistrates, "for that the defendant did, at, etc., on or about the first day of December, and upon other days and times, before and since, take and receive toll from the informant, at the toll-gate No. 3, situate on the macadamized road between Hamilton and Brantford, in the said district, unlawfully and improperly, the said gate not being in a situation or locality authorized by law," being removed into this Court by *certiorari*, was held bad in not shewing that the defendant was summoned, or was heard, and in not setting out the evidence, or stating that any complaint was made, or evidence given by any one on oath; in not stating how much toll was taken, and in not shewing in what respect the taking of toll was unlawful. (d)

(a) *Reg. v. Campion*, 28 U. C. Q. B. 259.

(b) *Smith v. Barnett*, L. R. 6 Q. B. 36, per *Blackburn*, J.

(c) *Foster and Tucker*, L. R. 5 Q. B. 224; see (Ont.) 32 Vic., c. 40; Con. Stats. Can., c. 86, s. 3.

(d) *Reg. v. Brown*, 4 U. C. Q. B. 147.

Where tolls, fixed by the Commissioners, are exacted by a toll-gate keeper, at a gate not six miles apart from the one previously passed, the toll-gate keeper, under the 3 Vic., c. 53, s. 34, is not liable to a summary conviction, for the Statute was intended to prevent the taking of more or less toll than the Commissioners have appointed. (a)

The following conviction — “Home District, to wit: Be it remembered, that on the 16th day of January, in the year of our Lord 1849, at the City of Toronto, in the District aforesaid, Thomas Haystead is convicted before me, S. G. Lynn, one of Her Majesty’s Justices of the Peace for the said District, for that he the said Thomas Haystead did, on the 14th day of January, instant, evade payment of toll, at the toll-gate situate on the Vaughan Branch of the Albion Planked Road; and I, the said Justice, adjudge the said Thomas Haystead, for his said offence, to forfeit and pay 10 shillings, and also to pay the sum of thirteen shillings and seven pence for costs, and, in default of immediate payment of the said sums, to be imprisoned in the gaol of this city for the space of one month, unless the said sums shall be sooner paid; and I direct that the said sum of ten shillings shall be paid to the Albion Road Company, and I order that the said sum of thirteen shillings and seven-pence shall be paid to me, the convicting Justice. Given under my hand and seal, etc.,” was held bad, in omitting, first, any statement of the information; second, the summons and appearance or default of the accused; third, his plea, denying or confessing; fourth, the evidence, and also in not shewing that any toll was claimed, or what toll, or how imposed, or that any could be claimed or imposed by reason of the completion of the road, or any part of it; also, because it

(a) *Reg. v. Brown*, 4 U. C. Q. B. 147.

did not appear therein that the defendant had proceeded on the road with any carriage or animal liable to pay toll, and, after turning out of the road, had returned to or re-entered it, with such carriage or animal beyond the toll-gate, without paying toll, whereby payment was evaded. (a)

A conviction, under s. 95 of this Act, stating that defendant wilfully passed a gate without paying, and refusing to pay, toll, was held good, and sufficiently shewing a demand of toll. *Quære*, whether it would be sufficient to allege that he wilfully passed without paying, and without, in any way, shewing a demand. (b) It was also held, in this case, that the non-exemption of the defendant, if essential to be alleged, was sufficiently stated in these words: "he, the said James Caister, not being exempted by law from paying toll on the said road," and the Con. Stats. Can., c. 103, s. 44, throws the proof on the defendant.

Where the general form prescribed by the Con. Stats. Can., c. 103, s. 50, sched. 1, is used it is clearly not requisite to shew that the defendant was summoned or heard, or any evidence given.

It is not necessary to name any time for payment of the fine, and, in such case, it is payable forthwith. (c)

In this case it was objected, (1) that M., the keeper and lessee of the gate, had no authority to exact toll; (2) that the Corporation had been dissolved; (3) that no Board of Directors had been appointed since 1866; (4) that, if legally appointed, they could not lease the gate; (5) that the lease to M. had expired; (6) that he could not take advantage of the penal clauses in the Act; (7) that it was not shewn that any toll had been fixed, but:—*Held*, that

(a) *Reg. v. Haystead*, 7 U. C. Q. B. 9.

(b) *Reg. v. Caister*, 30 U. C. Q. B. 247.

(c) *Ib.*

these objections could not be taken, for, where assuming the facts to be true, the Magistrate has jurisdiction, the conviction only can be looked to:—*Held*, also, as to objections 1, 4 and 6, that they were otherwise untenable, and, as to Nos. 2, 3, and 5, that the existence of the Corporation could not be enquired into, on the application to quash the conviction. (a)

Where the defendant, having been convicted on the information of a toll-gate keeper, of evading toll, appealed to the Quarter Sessions, where he was tried before a jury and acquitted, this Court refused a writ of *certiorari* to remove the proceedings, the effect of which would be to put him a second time on his trial, for which no authority was cited. (b)

The 32 & 33 Vic., c. 22, s. 40, enacts that whosoever, by any unlawful act, or by any wilful omission or neglect, obstructs, or causes to be obstructed, any engine or carriage, using any railway, or aids or assists therein, is guilty of a misdemeanor.

The prisoner unlawfully altered some railway signals at a railway station, from “all clear” to “danger” and “caution.” The alteration caused a train, which would have passed the station without slackening speed, to slacken speed, and come nearly to a stand. Another train, going in the same direction and on the same rails, was due at the station in half an hour:—*Held*, that this was obstructing a train, within the meaning of the above clause. (c)

The Act is not limited to mere physical obstructions. The prisoner, who was not a servant of the railway company, stood on a railway, between two lines of rails, at a point between two stations; as a train was approaching

(a) *Reg. v. Caister*, 30 U. C. Q. B. 247.

(b) *Stewart and Blackburn*, 25 U. C. Q. B. 16.

(c) *Reg. v. Hadfield*, L. R. 1 C. C. R. 253; 39 L. J. (M. C.) 131.



he held up his arms, in the mode used by inspectors of the line when desirous of stopping a train between two stations. The prisoner knew that his doing so would probably induce the driver to stop or slacken speed, and his intention was to produce that effect. This, as the prisoner intended that it should, caused the driver to shut off steam and diminish speed, and led to a delay of four minutes :—*Held*, that the prisoner had obstructed a train, within the meaning of the Statute. (a)

The 13 & 14 Vic., c. 74, contained provisions prohibiting the sale of Indian lands, but these provisions were omitted in the Con. Stats. Can., c. 9. The subject is now regulated by the 31 Vic., c. 42, and 32 & 33 Vic., c. 6. The latter Act repeals the Con. Stats. Can., c. 9, and is to be construed as one Act with the 31 Vic., c. 42. The 13 & 14 Vic., c. 74, made the purchasing of any Indian lands, unless under the authority and with the consent of Her Majesty, a misdemeanor, and various decisions took place as to what kind of contract was within the Act. (b)

The 31 Vic., c. 42, imposes certain penalties on persons trespassing on Indian lands; but, it is apprehended, the decisions under the old Act will not apply to the 31 Vic., c. 42, as the clauses of the former have not been re-enacted.

A conviction under the Pawn-brokers' Act, Con. Stats. Can., c. 61, for neglecting to have a sign over the door, as directed by the 7th section, is not sustained by evidence of one transaction alone, for the penalty attaches only on persons "exercising the trade of a pawn-broker," as mentioned in the first section, and a single act of receiving or

(a) *Reg. v. Hardy*, L. R. 1 C. C. R. 278.

(b) See *Reg. v. Hager*, 7 U. C. C. P. 380; *Reg. v. Baby*, 12 U. C. Q. B. 346; *Totten v. Watson*, 15 U. C. Q. B. 392; *Little v. Keating*, 6 U. C. Q. B. O. S. 265.

taking a pawn or pledge is not an exercising the trade or carrying on the business of a pawn-broker. (a)

The return of convictions by Justices of the Peace is now regulated by the 32 & 33 Vic., c. 31, s. 72, the 33 Vic., c. 27, s. 3, and (Ont.) 32 Vic., c. 6, s. 4. The Consolidated Statute of Upper Canada has been repealed. (b)

Under the former Statute a Justice of the Peace was liable for a separate penalty of £20, for each conviction of which a return was not properly made to the Sessions. (c)

Justices were not jointly liable in one penalty, but each in a separate penalty for not returning convictions. (d)

The object of the Legislature, in passing the Statutes, was to compel the Justices to make a return of whatever fines they had imposed, in order that their diligence in collecting the fines might be quickened, and also in order that it might be known what money they should admit themselves to have received, so that they might be made to account for it. (e)

The illegality of a conviction is no excuse for not returning it, but, if on that account the fine had not been levied, a return should be made explaining the circumstances. (f)

An order for the payment of money made by a Justice, under the Con. Stats. U. C., c. 75, is not a conviction, which it is necessary to return. (g) A conviction made by an alderman, in a city, must be returned to the next ensuing General Sessions of the Peace for the county, and not to the Recorder's Court for such city. (h)

(a) *Reg. v. Andrews*, 25 U. C. Q. B. 196.

(b) See 32 & 33 Vic., c. 36.

(c) *Donogh, q. t. v. Longworth*, 8 U. C. C. P. 437.

(d) *Metcalf, q. t. v. Reeve*, 9 U. C. Q. B. 263.

(e) *O'Reilly, q. t. v. Allan*, 11 U. C. Q. B. 415, per *Robinson, C. J.*

(f) *O'Reilly, q. t. v. Allan, supra.*

(g) *Ranney, q. t. v. Jones*, 21 U. C. Q. B. 370.

(h) *Keenahan, q. t. v. Egleson*, 22 U. C. Q. B. 626; see also *Ollard, q. t. v. Owens*, 29 U. C. Q. B. 515; *Grant, q. t. v. M'Fadden*, 11 U. C. C. P. 122; *Kelly, q. t. v. Cowan*, 18 U. C. Q. B. 104; *Murphy, q. t. v. Harvey*, 9 U. C. C. P. 528.

The form of order given in the schedule to Con. Stats. U. C., c. 123, respecting the costs of distress for rents, and penalties not exceeding \$80, states the unlawful charges to have been taken from the complainant, "under a distress for (as the case may be)." In an order under this Statute, it is sufficient to follow the statutory form in stating "a distress for rent," and it is unnecessary to state such suit to have been under \$80, in order to shew jurisdiction, and the words "(as the case may be)" direct only the insertion of mere words, specifying the kind of distress, rent or penalty, and an order, in other respects in the statutory form, is not liable to be set aside on the above grounds. (a)

The seller of flour, in barrels not marked or branded, is not liable to the penalty affixed by the 4 & 5 Vic., c. 89, s. 23, which applies only to the manufacturer or packer, and Magistrates have no summary jurisdiction, when the accumulated penalties are more than £10.

When the inspector, in a corporate town, is the informer, he is not entitled to half the penalty. (b)

The Statute only applies to flour made in this Province. (c)

The 8 Vic. c. 45, (d) was passed to prevent the profanation of the Lord's day.

Defendant was convicted, under the 8 Vic., c. 45, "for that he, Jacob Hespeler, of the village of Preston, Esquire, did on Sunday, the 26th day of July last past, at the township of Waterloo, work at his ordinary calling inasmuch as he, and his men, did make, and haul in hay, on the said day." He appealed to the Quarter Sessions,

(a) *Reg. v. Stewart*, 25 U. C. Q. B. 327.

(b) *Reg. v. Beekman*, 2 U. C. Q. B. 57.

(c) *Ib.*

(d) Con. Stats. U. C., c. 104.

where the question was tried before a jury, and the conviction affirmed. The proceedings having been removed by *certiorari* to this Court:—*Held*, that the Statute, 13 & 14 Vic., c. 54, extended to convictions under this Act, and authorized the trial by Jury; though, in the 8 Vic., c. 45, there is a provision for appeal to the Sessions, but not for such trial; that the conviction must be quashed, as not stating any offence within the Statute, for defendant was not alleged to be of, nor to have worked at, any particular calling, nor did it state any facts, from which this might be inferred. The Court also inclined to think the conviction was bad, for not negating the exception in the Statute, by stating that the work done was not one of necessity. (a) And it seems clear the conviction was bad, on the latter ground, for the exception is contained in the clause creating the offence. (b)

A person is liable, under the Act, for plying with his steamboat, on Sunday, between the city of Toronto and the peninsula—persons carried between those places, not being “travellers” within the meaning of the exception in the first section. (c)

A note made on Sunday, in payment of goods sold, on that day, is void as between the original parties, but not as against an indorsee for value, and without notice. (d)

The giving or taking security, as an ordinary mortgage of personal property, on a Sunday is not void as a “buying or selling,” within the Act. (e)

But all sales or agreements for a sale of real or personal property made on a Sunday are void. (f)

By 1 & 2 Wm., c. 32, s. 32. “If any person shall kill

(a) *Hespeler and Shaw*, 16 U. C. Q. B. 104.

(b) See post, pldg.

(c) *Reg. v. Tinning*, 11 U. C. Q. B. 636.

(d) *Houlston v. Parsons*, 9 U. C. Q. B. 681.

(e) *Wilt v. Lai*, 7 U. C. Q. B. 535.

(f) *Lai v. Stall*, 6 U. C. Q. B. 506.

or take any game or use any dog, gun, net, or other engine or instrument of destruction for the purpose of killing or taking game on a Sunday," he shall, on conviction, be liable to a penalty. The appellant was convicted for that he, on the 15th of August, (being Sunday) did use snares for the purpose of killing game. He set the snares, on the 13th and 14th of August, and, on the 15th, the snares were seen set ready to catch game, and two dead grouse were found caught in the snares:—*Held*, that a snare was an engine or instrument, within the meaning of the section, and that putting down a snare, on a day before Sunday, for the purpose of killing game, and keeping it set on Sunday, was using an engine or instrument on Sunday; that setting an instrument on a week day, with the intention that it shall operate on Sunday, and killing or taking game on that day, is an offence, and it is not necessary that the party should be present using the instrument. (a)

A farmer, working on his own land on a Sunday, is not liable to conviction, under 29 Car. 2, c. 7, s. 1. The words "or other person whatsoever" are to be construed *ejusdem generis*, and a farmer is not *ejusdem generis*, with a tradesman, who is the only *employer* named, nor with a labourer, who is a person employed. (b)

The 27 & 28 Vic., c. 17, amends the laws in force respecting the sale of intoxicating liquors, and contains provisions for the repression of abuses, resulting from such sale

This Act, and the 28 Vic., c. 22, for the punishment of persons selling liquor without licence, are intended to stand together, the latter applying where the former has no operation. (c)

(a) *Allen and Thompson*, L. R. 5 Q. B. 338.

(b) *Reg. v. Silvester*, 33 L. J. [M. C.] 79.

(c) *Graham v. M'Arthur*, 25 U. C. Q. B. 478.

The object of the 27 & 28 Vic., c. 18, was to repress the sale of intoxicating liquors, altogether, and its provisions were intended, to facilitate the conviction, and ensure the punishment, of offenders within it, as a means of repressing abuses resulting from the sale of intoxicating liquors. (a) It is limited to municipalities, where a temperance by-law is in force and suspends, the 28 Vic., c. 22, there during the continuance of such by-law, leaving it to apply elsewhere in Ontario. Therefore, where a Magistrate, sitting alone, convicted a party for selling liquor without a licence, in a township, where such a by-law was in operation, it was held that the conviction was void, as the 27 & 28, Vic., c. 18, s. 14, s. 3 expressly provides that any prosecution for the penalty must be brought before *two* Justices of the county, where the offence was committed. (b)

If the Collector of Inland Revenue prosecutes under this Act, two-thirds of the penalty belong to, and may be retained by, the collector, but he must pay one-third to the person, on whose information he instituted the prosecution, and the remaining one-third must be paid by the collector to the Receiver-General.

If a Municipal Corporation, or some person authorized by them, prosecutes, the whole penalty belongs to the corporation, and the council of the municipality may pay over not more than half to any other person, upon whose information the prosecution was instituted. If a person, not so authorized, prosecutes, the penalty belongs to the Corporation of the Municipality, whose by-law is thereby enforced, and the council may pay over to any other person, upon whose information the prosecution was instituted, not more than half the penalty. In the two last

(a) *Re M'Call*, 2 U. C. L. J. N. S. 17, per *Draper*, C. J.

(b) *Graham v. M'Arthur*, 25 U. C. Q. B. 478.

cases, where the corporation is not prosecutor, the Statute does not give them costs, but only the penalty. The conviction must adjudge, that the penalty enforced shall be paid to the party entitled, according to one of the foregoing provisions, to receive it. Where, instead thereof, it was, according to the conviction, as stated in the warrant of commitment, adjudged that the penalty be paid to one J., who was not shewn to be the Collector of Inland Revenue, in which character alone he would be entitled to it, the warrant of commitment was held bad, and the prisoner discharged from custody. (a)

The 14 & 15 Vic., c. 97, provided for the establishment of a Normal School, and the promotion of education in Lower Canada. Section 5 imposed a penalty on the Secretary-Treasurer of each Municipality, and every teacher of a Common School therein, for neglect or refusal to exhibit to the Inspector all and every the documents in their charge.

A conviction, by a Magistrate under this Act, awarding imprisonment for the penalty, and also for damages, and costs, was sustained. (b)

The 12 Vic., c. 55, amended the Act relating to masters and servants, in the country parts of Lower Canada. Under s. 3, a Justice of the Peace has no jurisdiction to punish servants for desertion, except in cases where there is a contract. (c)

On an appeal to the Quarter Sessions, from a Justice's conviction, apparently intended to be under O. S. U. C., c. 105, as amended by 25 Vic., c. 22, of having, at a time and place named, unlawfully entered the premises of defendant, being the west half of Lot No. 14, in the 1st Concession of the Township of Brooke, in the County of

(a) *Re M'Call*, 2 U. O. L. J. N. S. 17, per *Draper*, C. J.

(b) *Ex parte Moguin*, Rob. Dig. 73.

(c) Rob. Dig. 77.

Lambton, with men and teams, and cut down and destroyed certain trees thereon, and taken therefrom a certain valuable walnut log, without stating the premises were *wholly enclosed*; it appeared, in evidence, that the premises in question were, in fact, wholly enclosed, but the chairman directed the jury that the case, if any, was one arising under Con. Stat. Can., c. 93, s. 25, and that, in order to convict the defendant, they must be satisfied that the act was unlawful and malicious, and that the injury done amounted to 20 cents. The jury found the appellant guilty, adding the words "twenty cents." This verdict was recorded, without any mention of the further finding of the jury as to the amount. The chairman, notwithstanding, made an order quashing the conviction, considering that the jury had erred in their verdict, as there was no *averment* or evidence that the damage done amounted to 20 cents, and he refused to amend the conviction, under 29 & 30 Vic., c. 50:—*Held*, that the conviction was one under Con. Stats. U. C., c. 105, as amended by 25 Vic., c. 22, and that it was not competent for the Court of Quarter Sessions to convert the charge into one, under Con. Stats. Can., c. 93, s. 25; but that the chairman should have submitted the appeal to the jury, in accordance with 29 & 30 Vic., c. 50, notwithstanding the omission of the words *wholly enclosed*, and that, having submitted it to them, though with an erroneous charge, their verdict of guilty should not have been rescinded, but have been treated as a determination of the appeal, and the chairman should have amended the conviction, in accordance with 29 & 30 Vic., c. 50, by the insertion of the omitted words, "wholly enclosed," and have affirmed and enforced the same. (a)

Where the defendant appeared, on the evidence re-

(a) *M'Kenna v. Powell*, 20 U. C. C. P. 394.



turned, to have *bona fide* asserted a claim to the land which he had enclosed, it was held, not a proper case for the adjudication of the Mayor of Belleville, under 12 Vic., c. 81, s. 72 and 185, which gave the Mayor jurisdiction in certain cases, and that, consequently, the Mayor's summary conviction of the defendant, under that Act, might be quashed by *certiorari*. (a)

To constitute an offence, under the 3rd section of the 7 Geo. 4, c. 8, providing for the maintainance of good order in churches, the act complained of must have been committed "during divine service." (b)

An information, setting out that the defendant had conducted himself in a disorderly manner at a church door, by keeping his hat on his head during the procession of the Holy Sacrament, discloses no legal offence. (c)

Where a Justice of the Peace convicted the plaintiff, under the Con. Stats. Can., c. 92, s. 18, of making a disturbance in a place of worship, and committed him to gaol, without first issuing a warrant of distress to levy fine and costs under that section:—*Held*, that the Con. Stats. Can., c. 103, ss. 57 and 59, applied to this conviction, and that the Justice, being satisfied the party had no goods, had authority and jurisdiction, under the latter Statute, to commit to gaol, without first issuing a warrant to levy fine and costs. (d)

The 32 & 38 Vic., c. 28, provides that certain persons, therein described, shall be deemed vagrants, and shall, upon conviction before any Stipendiary or Police Magistrate, Mayor or Warden, or any two Justices of the Peace, be deemed guilty of a misdemeanor.

The prisoner was convicted under s. 1 of this Act, for

(a) *Reg. v. Taylor*, 8 U. C. Q. B. 257.

(b) *Ex parte Dumouchel*, 3 L. C. R. 493.

(c) *Ex parte Filiau*, 4 L. C. R. 129.

(d) *Moffat v. Barnard*, 24 U. C. Q. B. 498.

that she was, in the night time of the 24th February, 1870, a common prostitute, wandering in the public streets of the City of Ottawa, and not giving a satisfactory account of herself, contrary to the Statute:—*Held*, that the conviction should allege that the woman was asked, before she was taken, or at the time of her being taken, to give an account of herself, and that she did not give a satisfactory account, and that, therefore, the arrest was made. (a) The Court were of opinion that the allegation, she giving no satisfactory account, did not shew that any prior demand or request had been made upon her for that purpose. *Semble*, the evidence should shew the place where the person is found, and that it is within the Statute, and also that the person is a common prostitute, and so subject to the provisions of the Statute. (b)

The prisoner threatened A.'s father that he would accuse A. of having committed an abominable offence upon a mare, for the purpose of putting off the mare, and forcing the father, under terror of the threatened charge, to buy and pay for her at the prisoner's price:—*Held*, that the prisoner was guilty of threatening to accuse, with intent to extort money, within the meaning of the 24 & 25 Vic., c. 96, s. 47, which is similar to the 32 & 33 Vic., c. 21, s. 46. (c)

The Con. Stats. Can., c. 67, s. 16, which declares it a misdemeanor, in any operator or employee of a telegraph company, to divulge the contents of a private despatch, only protects the rights of each individual sender or receiver of a message against disclosures of facts, which come to the knowledge of the operators in the course of

(a) *Reg. v. Levecque*, 30 U. C. Q. B. 509.

(b) *Ib.*

(c) *Reg. v. Redman*, L. R. 1 C. C. R. 12; 35 L. J. (M. C.) 89. As to threats within the 6 Geo. 4, c. 129, s. 3, of force to a master to limit the number of his apprentices, see *Wood and Bowron*, L. R. 2 Q. B. 21.

their employment. When the rights of others come in question, as when a suit is pending between the sender or receiver of a message and a third party, with whom he is alleged to have contracted, the operator or secretary of the company is bound to disclose the contents of the telegram, in obedience to a *subpœna duces tecum*. (a)

The 1 & 2 Wm. 4, c. 32, ss. 3 and 23, forbids, under penalties, the killing or taking of certain game during certain intervals of the year, and s. 23 imposes penalties on any person killing or taking game, or using a dog or engine for that purpose, not being authorised, for want of a certificate. A person, using an engine for taking game without a certificate, during the forbidden interval, is liable to penalties, under the latter section, although he may also be liable to penalties under s. 3; as there is no reason why a man should not be liable to two penalties for the two offences, one against the law for the preservation of game; and one against the revenue, no matter at what season of the year. (b)

The 27 & 28 Vic., c. 47, s. 2, enacts that when any person shall, on indictment, be convicted of any crime punishable with penal servitude, after having been previously convicted of felony, the least sentence of penal servitude that can be awarded shall be a period of seven years.

A. was convicted of the misdemeanor of having done grievous bodily harm to B. The indictment did not charge a previous conviction of felony, but, after the jury had found A. guilty, it was proved, on oath, that A. had been previously convicted of felony, but no record or certificate of such conviction was produced. A. was sentenced to penal servitude for five years, as for a misdemeanor only, without any previous conviction of felony: —*Held*, that the sentence was correct. (c)

(a) *Leslie v. Hervey*, 15 L. C. J. 9.

(b) *Saunders v. Baldy*, L. R. 1 Q. B. 87.

(c) *Reg. v. Summers*, L. R. 1 C. C. R. 182; 38 L. J. (M. C.) 62.

The prisoner was convicted of a crime punishable with penal servitude, and it was proved that he had been previously convicted of felony; but the previous conviction was not stated in the indictment:—*Held*, therefore, that the above section did not apply. (a)

By the 11 & 12 Wm. 3, c. 12, and 42 Geo. 3, c. 85, if any Governor of a colony, or other person holding, or having held, public employment out of Great Britain, has been guilty of any crime or misdemeanor in the exercise of his office, every such crime may be prosecuted or enquired of, and heard and determined in the Court of King's Bench in England, either upon information by the Attorney-General, or upon indictment found, and such crime may be laid to have been committed in Middlesex. An offence under the above Statute is an offence committed on land beyond the seas, for which an indictment may legally be preferred in any place in England, within the 11 & 12 Wm. 3, and this section and the other enactments of the Statute, as to preliminary examinations, etc., before a Magistrate, in whose jurisdiction the accused might be, apply to charges under the above Statutes, and the Court of Queen's Bench is included in the term, "next Court of Oyer and Terminer." (b)

Upon an indictment under the Con. Stats. U. C., c. 26, s. 20, for making an assignment to defraud creditors:—*Held*, that a money bond is personalty seizable on an execution, under the Statutes 13 & 14 Vic., c. 58, and 20 Vic., c. 57, and, further, that a transfer, made by a party to a creditor, who accepted the same in full satisfaction and discharge of his debt, did not render the party making such assignment less liable under this indictment. (c)

Under the 4 & 5 Vic., c. 27, s. 27, Magistrates could

(a) *Reg. v. Willis*, L. R. 1 C. C. R. 363.

(b) *Reg. v. Eyre*, L. R. 3 Q. B. 487; see 32 & 33 Vic., c. 30, s. 3.

(c) *Reg. v. Potter*, 10 U. C. C. P. 39.

not issue their warrant to imprison *absolutely* for so many days, but only to imprison for so many days unless the fine and costs be sooner paid. (a)

Under the Statute for repressing riots at elections, no power was given to Magistrates to convict summarily, but the offenders must have been tried by a jury. (b)

To subject a person to the penalty of the 22 Geo. 2, c. 45, for suing out process, the attorney allowing his name to be used must be first convicted. (c)

An offence committed before, though tried after, the Revised Statutes came in force is not indictable under those Statutes, though the words creating the offence are not altered thereby, the Act creating it being embodied in the Revised Statutes in its original words. The indictment must be considered as founded on the Act creating the offence. (d)

The punishment provided by the ordinance 4 Vic., c. 80, s. 1, is cumulative, and sentence of imprisonment and fine is to be awarded upon the conviction had against the defendant in manner and form, as enacted by the ordinance. (e)

An overseer of the poor of a parish is liable, under the Acts of Assembly, 26 Geo. 3., cs. 28 and 43, and 33 Geo. 3, c. 6, to an indictment for not accounting, to the first General Sessions of the Peace in the year, for moneys received by him for the support of the poor, during the preceding year. (f)

(a) *Ferguson v. Adams*, 5 U. C. Q. B. 194.

(b) *Ib.*

(c) *Rex v. Bidwell*, Taylor's, 487.

(d) *Reg. v. Pope*, 3 Allen, 161; *Reg. v. M'Laughlin*, *ib.* 159.

(e) *Reg. v. Palliser*, 4 L. C. J. 276.

(f) *Reg. v. Matthew*, 2 Kerr, 543.

## CHAPTER VIII.

## EVIDENCE.

THE *rules* of evidence are, in general, the same in civil and criminal proceedings. (a)

There are, however, some exceptions. Thus, the doctrine of estoppel has a much larger operation in the former. So an accused person may, at least if undefended by counsel, rest his defence on his own unsupported statement of facts, and the jury may weigh the credit due to that statement. Again, confessions, or other self-dis-serving statements of prisoners, will be rejected, if made under the influence of undue promises of favour or threats of punishment. So, although both these branches of the law have each their peculiar presumptions, still the technical rules, regulating the burden of proof, cannot be followed out in all their niceties when they press against accused persons. (b)

There is a strong and marked difference in the *effect* of evidence in civil and criminal proceedings. In the former a mere preponderance of probability due regard being had to the burden of proof, is sufficient basis of decision; but in the latter, especially, when the offence charged amounts to treason or felony, a much higher degree of assurance is required. (c)

The persuasion of guilt ought to amount to such a

(a) *Reg. v. Atkinson*, 17 U. C. C. P. 304, per *J. Wilson*, J.

(b) *Best on Ev.*, 4 Edn. 122.

(c) *Clark v. Stevenson*, 24 U. C. Q. B. 209, per *Draper*, C. J.; *Hollingham v. Head*, 4 C. B. N. S. 388; *Reg. v. Jones*, 28 U. C. Q. B. 421, per *Richards*, C. J.

moral certainty, as convinces the minds of the tribunal, as reasonable men, beyond all reasonable doubt. (a)

The *onus* of proving every thing essential, to the establishment of the charge against the accused, lies on the prosecutor. This rule is derived from that maxim of law, that every person must be presumed innocent until proved guilty. It is, however, in general, sufficient to prove a *prima facie* case ; then, if circumstances calling for explanation are not explained, the case becomes stronger, for, as has been remarked, imperfect proofs, from which the accused might clear himself, and does not, become perfect. (b) The presumption of innocence only obtains before verdict ; after verdict of guilty, all presumptions will be against it. (c) The rule that the burden of proof lies on the party, who, substantially, asserts the affirmative, is applicable in criminal cases. (d)

But in some cases, where negative proof is peculiarly within the knowledge of a party, he is bound to adduce it. The rule of law is plain, that, where any one is proceeded against for doing an act, which he is not permitted to do, unless he has some special licence or qualification in his favour, it is sufficient to charge this want of licence or qualification against the party, and it is for the latter to prove it affirmatively (e) ; for it is not incumbent on the prosecutor, to give any negative evidence. (f)

A doubt was suggested in *Barrett's* case, as to whether the prosecutor must not first give some *general* evidence, to cast the *onus* on the other side. (g)

(a) *Reg. v. Jones*, 28 U. C. Q. B. 421, per *Richards*, C. J.

(b) *Reg. v. Jones*, 28 U. C. Q. B. 425, per *Richards*, C. J. ; *Reg. v. Atkinson*, 17 U. C. C. P. 303, per *J. Wilson*, J.

(c) *Reg. v. Hamilton*, 16 U. C. C. P. 361, per *Richards*, J.

(d) *Re Barrett*, 28 U. C. Q. B. 561, per *A. Wilson*, J. ; *Rex v. Hazy*, 2 C. & P. 458.

(e) *Re Barrett*, *supra*, 561, per *A. Wilson*, J. ; *Rex v. Turner*, 5 M. & S. 206.

(f) *Ex parte Parks*, 3 Allen, 237.

(g) See *Elkin v. Janson*, 13 M. & W. 662, per *Alderson*, B. See, however *Apoth. Co. v. Bentley*, R. & M. 159.

In criminal cases, whether the evidence be circumstantial, or direct and positive, the jury must decide, not simply that all the facts are consistent with the prisoner's guilt, but, that they are inconsistent with any other rational conclusion than that the prisoner is the guilty person. (a)

The prisoner cannot be convicted, if there is a reasonable doubt of his guilt, however strong the weight or decided the preponderance of evidence may be against him. (b)

Whether, the evidence is circumstantial, or direct and positive, its weight and credibility are to be decided by the jury. They must make all necessary inferences from the facts proved, and it lies within their peculiar province to decide on the credibility of witnesses (c)

In drawing an inference or conclusion from facts proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded of explanation or contradiction. No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but, where such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion, to which the proof tends, be untrue, and the accused offers no explanation or contradiction, the conclusion, to which the proof tends, becomes almost irresistible. (d)

In regard to deciding on the credibility of a witness,

(a) *Reg. v. Greenwood*, 23 U. C. Q. B. 258, per *Draper*, C. J.; *Taylor's Ev.*, 84; and see *Reg. v. Jones*, 28 U. C. Q. B. 416.

(b) *Reg. v. Atkinson*, 17 U. C. C. P. 305, per *J. Wilson*, J.; and see *Reg. v. Chubbs*, 14 U. C. C. P. 43 n.

(c) *Reg. v. Jones*, 28 U. C. Q. B. 416; *Reg. v. Greenwood*, 23 U. C. Q. B. 255; *Reg. v. Chubbs*, 14 U. C. C. P. 32; *Reg. v. Seddons*, 16 U. C. C. P. 389; *Reg. v. M'Ilroy*, 15 U. C. C. P. 116.

(d) *Reg. v. Atkinson*, 17 U. C. C. P. 305, per *J. Wilson*, J.



the jury should consider the nature of the story he tells, and his manner of telling it; the probability of its being true; his demeanour and his readiness to answer some questions; as well as his unwillingness to answer others, and his whole conduct indicating favour to one side or the other. On the other hand, the jury should consider, whether the witness exhibits a frank straight-forward manner of answering questions, without regard to consequences to either party; a desire to state all the facts, and no hesitation to answer the various questions put to him. (a)

Where a witness, examined on the trial, directly confessed the crime, it was held that the Judge was not bound to tell the jury that they must believe this witness, in the absence of testimony to shew her unworthy of credit, but that he was right in leaving the credibility of her story to them; and, if from her manner he derived the impression that she was under the influence of some one in Court, it was not improper to call their attention to it in his charge. (b)

A prisoner, being indicted for the murder of one H., the principal witness for the Crown stated that the crime was committed, on the 1st of December, 1859, on a bridge over the river Don, and that the prisoner and one S., threw H. over the parapet of the bridge into the river. S. had been previously tried and acquitted. The counsel for the prisoner proposed to prove by one D., that S. was at his (D.'s) place fifty miles off on that evening, but the learned Judge rejected the evidence, saying that S. might be called, and if the Crown attempted to contradict his evidence, he would allow the prisoner to call witnesses to corroborate it. D.'s evidence was rejected, on the

(a) *Reg. v. Jones*, 28 U. C. Q. B. 419, per *Richards*, C. J.

(b) *Reg. v. Jones*, *supra*, 416.

ground that S.'s presence was a fact collateral to the enquiry, whether the prisoner was guilty of the murder, and if the evidence of third parties were received to prove an *alibi* on the part of S., the Judge might be called upon to try many other collateral issues. S. was called, and swore that he was not present at the time, and that he was not on the bridge with the prisoner, at any time, during that year. He was not contradicted by the prosecution, and they called no rebutting or impeaching testimony. The prisoner's counsel inferred from the remarks of the judge that D. would not be admitted, and he did not, therefore, call him. It was held that the presence of S. was a fact material, and not collateral to the enquiry, and that D., therefore, should have been admitted, when tendered, on the broad principle that he was called to speak on a matter, directly connected with the very fact under investigation, and his evidence would affect the credibility of the evidence for the prosecution. (a)

Where two prisoners are jointly indicted, one of them may, in certain cases, be acquitted, and called as a witness for the other. The general rule on this point is: where the prosecutor, in order to exclude the evidence of a material witness for the defendant, prefers his indictment against two jointly, and no evidence whatever is given against the person, thus unjustly made a defendant, the Judge, in his discretion, may direct the jury to acquit either during the progress, or at the termination of the enquiry, so as to give an opportunity to the other defendant to avail himself of his testimony. (b)

The ground of this rule is to prevent the prosecutor

(a) *Reg. v. Brown*, 21 U. C. Q. B. 330.

(b) *Reg. v. Kennedy*, 2 Thomson, 218, per *Wilkins, J.*; *Reg. v. Hambly*, 16 U. C. Q. B. 617; *Rex. v. Owen*, 9 C. & P. 83; *Rex. v. O'Donnell*, 7 Cox, 337; Arch. Cr. Pldg. 274.

from excluding the evidence of a material witness, by joining him in the indictment. But, as in a criminal case, the indictment against all the prisoners is usually found by a Grand Jury, and should only be found upon, at least, a *prima facie* case of guilt against all, it is somewhat distinguishable from a civil action, and seems to call for the exercise of a more guarded discretion on the part of the Judge, lest an accomplice in guilt escape through an unfortunate and premature acquittal. The circumstance, that the indictment is found by the Grand Jury, affords less ground for the suspicion that the party is made a defendant, for the purpose of excluding his testimony. (a) In a criminal case, though no evidence appears against one defendant, there is no necessary inference that he was made a defendant for this purpose. (b) Where there is no evidence, whatever, against one defendant, he should be acquitted at the close of the prosecutor's case (c); but it seems this is discretionary with the Judge. (d) If there is some evidence, though very slight against the prisoner, his case must be submitted to the jury. (e)

If, after the close of the *prisoner's* case, there is no legal evidence of his guilt, it seems the Judge would be bound to direct an acquittal. (f) The correct and reasonable rule would appear to be that it is discretionary with the Judge to direct an acquittal, if applied for before the close of the prisoner's case; but that it is obligatory upon him to do so, when the case for the defence is closed, particularly if it appears the prisoner was made a defendant, for the purpose of excluding his testimony.

(a) *Reg. v. Kennedy*, 2 Thomson, 211, per *Bliss*, J.

(b) *Ib.* 219, per *Wilkins*, J.

(c) *Reg. v. Hambly*, 16 U. C. Q. B. 617.

(d) *Ib.*; *Reg. v. Kennedy*, 2 Thomson, 203.

(e) *Ib.*; *Reg. v. Hambly*, *supra*, 625.

(f) *Reg. v. Kennedy*, *supra*.

Where, at the close of the case for the Crown, very slight evidence appears against one of two prisoners jointly indicted, the other cannot of right claim that the case of the former be submitted separately to the jury; but this is discretionary with the Judge. The question whether the Judge has properly exercised his discretion, or not, cannot be reserved as a point for the consideration of the Court. (a)

Whenever a co-defendant is ordered to be acquitted, in anticipation of the general verdict, his credit is left to the jury, how strong soever the bias on his mind may be. (b)

If the Judge refused to direct an acquittal, for the purpose of evidence of the co-defendant against whom there appeared neither legal proof, nor *moral* implication, a verdict against the other prisoner would be set aside. (c)

Where two prisoners are jointly indicted for felony, and plead not guilty, but one only is given in charge to the jury, the other is an admissible witness against the one on trial, although the plea of not guilty remains on the record undisposed of; the witness not having been acquitted or convicted, and no *nolle prosequi* having been entered. (d)

It is conceived that this decision will hold in Ontario at least, as the evidence Act here, Con. Stats. U. C. c. 32, s. 18, only protects a party in criminal proceedings, from giving evidence *for* or *against* himself. It is also unaffected, by the (Ont.) 33 Vic., c. 13.

Notwithstanding 32 & 33 Vic., c. 29, ss. 62 & 63, a prisoner jointly indicted with another cannot, after they have been given in charge to the jury, be called as a

(a) *Reg. v. Hambly*, 16 U. C. Q. B. 617.

(b) *Reg. v. Kennedy*, 2 Thomson, 219-20, per *Wilkins*, J.

(c) *Ib.* 220, per *Wilkins*, J.

(d) *Winsor v. Reg.*, L. R. 1 Q. B. 390 (ex chr.); 35 L. J. (M. C.) 161.

witness for the other, without having been either acquitted or convicted or a *nolle prosequi* entered. (a)

Parties separately indicted for perjury alleged to have been committed at one, and the same hearing, can be witnesses for each other. (b)

Where four prisoners were indicted together for robbery, and one severed, in his challenges, from the other three, who were tried first:—*Held*, that the former, although not actually upon his trial, after pleading not guilty, and before trial or judgment, was a competent witness on their behalf. (c) He would also be competent for the Crown. (d)

It would seem that, in any case, one prisoner, whether he pleads guilty or not guilty, may, if he severs in his challenges from the other prisoners, and the Crown elects to proceed against the others first, so that he is not on trial with them, be called for the prosecution; and this on the ordinary principles of the common law. (e)

In such cases, however, it might be advisable, in order to ensure the greatest possible amount of truthfulness in the person coming to give evidence, to take a verdict of not guilty, as to him, or to have his plea of not guilty withdrawn, and a plea of guilty taken and sentence passed, so that the witness may give his evidence with a mind free from all the corrupt influences which the fear of impending punishment, and the desire to obtain immunity to himself at the expense of the prisoner, might otherwise produce. (f) This course cannot, however, be

(a) *Reg. v. Payne*, L. R. 1 C. C. R. 349.

(b) *Reg. v. Pelletier*, 15 L. C. J. 146.

(c) *Reg. v. Jerrett*, 22 U. C. Q. B. 499.

(d) *Ib.* 500, per *Hagarty*, J.

(e) *Ib.* 500, *et seq.* per *Hagarty*, J.; see *Reg. v. King*, 1 Cox, C. C. 232; *Reg. v. George*, C. & Mar. 111; *Reg. v. Williams*, 1 Cox, C. C. 289; *Reg. v. Stewart*, *ib.* 174; *Reg. v. Gerber*, 1 Temp. & Mew. 647; *Reg. v. Clouter*, 8 Cox. C. C. 237.

(f) *Winsor v. Reg.* L. R. 1 Q. B. 312, per *Cockburn*, C. J.

held absolutely necessary, since the decision of this case in the Exchequer Chamber.

As to the competency of witnesses, a child of any age, if capable of distinguishing between good and evil, may be admitted to give evidence.

A child of six years of age was examined—on being interrogated by the Judge, and making answers that there was a God, that people would be punished in hell who did not speak the truth, and that it was a sin to tell a falsehood under oath, although he stated he did not know what an oath was. (a)

On a trial for murder, an Indian witness was offered, and, on his examination by the Judge, it appeared that he had a full sense of the obligation to speak the truth, but he was not a Christian, and had no knowledge of any ceremony, in use among his tribe, binding a person to speak the truth or imprecating punishment upon himself if he asserted what was false. It appeared also that he and his tribe believed in a future state, and in a supreme being who created all things and in a future state of reward and punishment according to their conduct in this life. He was then sworn in the ordinary way on the New Testament, and it was held that his evidence was admissible. (b) If the witness had belonged to any nation or tribe that had in use among them any particular ceremony, which was understood to bind them to speak the truth, however strange, and fantastic the ceremony might be, it would have been indispensable that the witness should have been sworn according to such ceremony; because all should be done, that can be done, to touch the conscience of the witness according to his notions, however superstitious they may be. (c)

(a) *Reg. v. Berube*, 3 L. C. R. 212.

(b) *Reg. v. Pah-mah-gay*, 20 U. C. Q. B. 195.

(c) *Ib.* 198, per *Robinson*, C. J.

The defendant, on his trial upon an indictment, cannot give evidence for himself, nor can his wife be admitted as a witness for him. (a)

The wife of any one of several prisoners, jointly indicted, stands in the same position with respect to the admissibility of her evidence as her husband.

A joint indictment was preferred against T. and D., for stealing fifty-six pounds of onions the property of their master, and against H. for receiving the same, knowing them to be stolen. The wife of H. was offered as a witness for the prisoners, T. and D.:—*Held*, that her evidence was inadmissible. (b)

Where A. and B. were tried together, on a joint indictment for assault on a peace officer, and the wife of A. was offered, as a witness, to disprove the charge against B.:—*Held*, that her evidence was properly rejected, but had the husband not been on his trial, she would have been a competent witness; (c) *quære* whether a witness can be called to give evidence for one purpose only, and, whether, if examined at all, it must be upon all matters in the record. (d)

The prisoner was indicted in one count, for obtaining money from trustees of a Savings Bank, by pretending that a document produced to the bank by E., the wife of T., had been filled up with his authority; and, in another count, for a conspiracy between the prisoner and E., to cheat the bank, but E. was not indicted. The evidence of T. having been received in support of the prosecution, the prisoner was acquitted on the count for conspiracy, and convicted on the other:—*Held*, that the evidence of T. was properly received and the conviction good. (e)

(a) *Reg. v. Humphreys*, 9 U. C. Q. B. 337; and see *Reg. v. Madden*, 14 U. C. B. 588.

(b) *Reg. v. Thompson*, L. R. 1 C. C. R. 377.

(c) *Reg. v. Thompson*, 2 Hannay, 71.

(d) *Ib.*

(e) *Reg. v. Halliday*, 7 U. C. L. J. 51; Bell, 257; 29 L. J. (M. C.) 148.

A conviction, on the evidence of an accomplice would be good in law, if the Judge directed the attention of the jury to the rule of practice, by which the testimony of the accomplice requires corroboration as to the identity of the accused. (a)

It seems the conviction would be good, if the Judge did not act on this rule, (b) and the testimony of the accomplice were uncorroborated. (c)

Judges, in their discretion, will advise a jury not to convict a prisoner, upon the testimony of an accomplice alone without corroboration. The practice of giving such advice is now so general that its omission would be deemed a neglect of duty on the part of the Judge. (d) The direction of the Judge should be so strongly against the testimony, if uncorroborated, as almost to amount to a direction to acquit. (e)

In *Reg. v. Seddons*, (f) the jury were told that the testimony of the accomplice was not sufficiently corroborated to warrant a conviction, whereupon they came into Court stating, that they thought the prisoner guilty, but that he ought not to be convicted on the evidence. They were then told that they ought to acquit; but, after a short interval, they returned a verdict of guilty. Before recording their finding, the presiding Judge recommended them not to convict on the evidence, saying, however, they could do so if they thought proper. They nevertheless adhered to their verdict, and the Court held that there was neither error, nor misconduct in fact, nor in law.

(a) *Re R. B. Caldwell*, 6 C. L. J. N. S. 228; 5 U. C. P. R. 221, per A. Wilson, J.; *Reg. v. Seddons*, 16 U. C. C. P. 389.

(b) *Reg. v. Charlesworth*, 9 U. C. L. J. 53, per Blackburn, J.

(c) *Reg. v. Fellowes*, 19 U. C. Q. B. 51, et seq. per Robinson, C. J.; *Reg. v. Beckwith*, 8 U. C. C. P. 274.

(d) *Reg. v. Beckwith*, *supra*, 279, per Draper, C. J.

(e) *Reg. v. Seddons*, *supra*, 394, per A. Wilson, J.

(f) *Supra*.



In *Beckwith's* case, the corroborative evidence did not affect the *identity* of the accused ; it did not shew that he was the *guilty* party ; and it might be said only to concur with the testimony of the accomplice, as to the *manner* in which the crime was committed. The learned Judge (*Draper, C. J.*) adverted to the fact that there had been a departure from that which, the authorities shew, is a well settled practice, as to the manner in which the testimony of an accomplice is left to the jury ; and he regretted that there should be an omission to submit his evidence to the jury coupled with a caution, which the practice and authority of the most eminent Judges, in England, recommend. But he considered that the alleged misdirection was in a matter of *practice*, and that, on the authority of *Reg. v. Stubbs*, (a) it could not be treated as a point of law, nor was it a question of fact, and a rule *nisi* obtained for a new trial, under Con. Stats. U. C., c. 113, was therefore discharged. It must be recollected in considering these reasons of the learned Judge, that the application was made under the above Statute, and the Court was then of opinion the only grounds, it opened up was " upon any point of law or question of fact." (b)

The rule that the evidence of an accomplice requires corroboration is not a rule of law ; but, of general and usual *practice*; the application of which is for the discretion of the Judge, by whom the case is tried, and in its application much depends upon the nature of the offence, and the extent of the complicity, of the witness in it. (c)

The evidence of an incompetent witness may be withdrawn from the jury, upon his incompetency appearing during his examination in chief, although he has been

(a) *Dears*, 555 ; 1 Jur. N. S. 1115 ; 25 L. J. (M. C.) 16.

(b) See the judgment in this case.

(c) *Reg. v. Seddons*, 16 U. C. C. P. 394, per *A. Wilson, J.* ; *Reg. v. Boyes*, 1 B. & S. 320, per *Wightman, J.*

examined previously on the *voir dire*, and pronounced to be competent. (a)

So illegal evidence allowed to go to the jury, under a reserve of objection, may be subsequently ruled out by the Judge, in his charge, and the conviction is not invalidated thereby, if it does not appear that the jury were influenced by such illegal evidence. (b)

One witness is in general sufficient to establish the charge on an indictment. Neither Statute, nor any principle of the common law requires the testimony of a second witness except in cases of treason and perjury. (c)

A witness is not compellable to disclose confidential communications, but this rule does not protect a physician from disclosing information acquired by him, confidentially, in his professional character (d)

At common law, a witness is entitled to refuse to answer questions that may tend to criminate him; not only because the answer itself might be evidence against him on a criminal charge, but because it might form a link in the chain of testimony which might implicate him in such charge. (e) A witness is not compellable to answer any question tending to subject him to a penalty, nor a question forming a link in a chain of evidence tending to criminate him. (f) Questions tending to destroy his defence must be regarded as tending to subject the witness to a penalty. (g) If the witness declines answering no inference of the truth of the fact can be drawn from that circumstance. (h)

It, however, appears now to be settled that for the

(a) *Reg. v. Whitehead*, L. R. 1 C. C. R. 33; 35 L. J. (M. C.) 186.

(b) *Reg. v. Fraser*, 14 L. C. J. 245.

(c) *Reg. v. Fellowes*, 19 U. C. Q. B. 51, per *Robinson*, C. J.

(d) *Browne v. Carter*, 9 L. C. J. 163.

(e) *Reg. v. Hulme*, L. R. 5 Q. B. 384, per *Blackburn*, J.

(f) *Burton, q. t. v. Young*, 17 L. C. R. 379.

(g) *Ib.* 392, per *Meredith*, J.

(h) *Ib.* 392, per *Meredith*, J.

purpose of impeaching the credit of a witness, he may always be asked on cross-examination, questions with regard to, alleged crimes or other improper conduct on his part. (a) But the witness cannot be compelled to answer such questions, where the answers would have a tendency to expose him to a criminal charge, or to a penalty or forfeiture of any nature. (b)

It has been held that if a witness intends to insist on his right, to refuse answering any question, tending to subject him to a penalty, he must do so at once; if he answers part, he must answer all. (c)

Where a witness, called to prove that the consideration of a note was usurious, declined to state what amount he gave, on discounting the note, because his answer might render him liable to a penalty, but on cross-examination said that he gave what he thought it was worth, the Court held that he was bound in re-examination to state what he gave, on the ground that having, answered part, he was bound to answer the whole. (d)

But it is, elsewhere, laid down that the witness may claim the protection of the court, at any stage of the enquiry; although he may have already answered, without objection, some questions tending to criminate him. (e)

The rule that no man shall be obliged to criminate himself has been annulled, by the English Bankruptcy Acts; in the case of examinations of the bankrupt and others in bankruptcy. (f)

Upon the trial of the defendant for bribery, a witness was called upon to give in evidence the receipt of a bribe by him from the defendant. Upon his objecting to

(a) See also 32 & 33 Vic., c. 29, s. 65.

(b) Arch. Cr. Pldg. 279; *Taylor Ex.* 1222-1236 (4th Ed.); 3 Russ. Cr. 540.

(c) *Peters v. Irish*, 4 Allen, 326.

(d) *Ib.*

(e) *Reg. v. Garbett*, 2 C. & K. 474; Arch. Cr. Pldg. 279.

(f) *Reg. v. Robinson*, L. R. 1 C. C. R. 80; *Reg. v. Scott*, Dears. & B. C. C. 47; 25 L. J. (M. C.) 128; *Reg. v. Sheen*, Bell, C. C. 97; 28 L. J. (M. C.) 98.

answer, on the ground that his answer would criminate himself, a pardon, under the Great Seal, was offered, and accepted by him ; but he still refused to answer, on the same ground :—*Held*, that, as the pardon protected the witness against every proceeding, except an impeachment by the House of Commons, and as there was no probability whatever, under the circumstances of the case, that the witness would ever be subjected to such a proceeding, for the matter which he was called upon to give in evidence, he was not privileged from answering :—*Held*, also, that the Judge was bound to compel the witness to answer. (a)

A pardon granted to a person by Her Majesty does not remove the effect of an attainder produced by the condemnation of the person to death by a court martial. (b)

A witness may now be cross-examined as to previous statements made by him, in writing, or reduced into writing, relative to the subject matter of the case, without such writing being shewn to him.

A question should not be put to a witness, in cross-examination, for the mere purpose of contradicting him, unless such question is relevant to the matter in issue ; but if an irrelevant question be put, the answer is conclusive ; (c) for, otherwise, the Court would be involved in the trial of innumerable issues, totally unconnected with the matter under investigation, (d) and which the parties would not be prepared to meet. (e)

On an indictment for rape, or attempt at rape, or for an indecent assault, amounting, in substance, to an

(a) *Reg. v. Boyes*, 8 U. C. L. J. 139 ; 2 F. & F. 157 ; 1 B. & S. 311 ; 30 L. J. (Q. B.) 301.

(b) *Rochon v. Leduc*, 1 L. C. J. 252.

(c) *Gilbert v. Gooderham*, 6 U. C. C. P. 39 ; *Reg. v. Brown*, 21 U. C. Q. B. 334, per *Robinson*, C. J.

(d) *Ib.* 334, per *Robinson*, C. J.

(e) *Reg. v. Holmes*, L. R. 1 C. C. R. 334.

attempt at rape, if the prosecutrix is asked, in cross-examination, whether she has had connection with another person, not the prisoner, and denies it, evidence cannot be called to contradict her. (a)

Now, however, by 32 & 33 Vic., c. 29, s. 65, if a witness, on being questioned as to whether he has been *convicted* of any felony or misdemeanor, either denies the fact, or refuses to answer, the *opposite* party may prove such conviction.

By s. 69, if a witness, upon cross-examination as to a former statement made by him, relative to the subject matter of the cause, and inconsistent with his present testimony, does not distinctly admit that he did make such statement, proof may be given that he did, in fact, make it.

In order to impeach the character of a witness for veracity, persons may be called to prove that his general reputation is such that they would not believe him on his oath. (b) In cross-examining the witness for this purpose, counsel is not obliged to explain the object of his questions, because that might often defeat his object. (c)

Where a witness called for the Crown gave evidence quite different from a previous written statement made by him to the prosecutor's counsel, but admitted such statement when shewn to him on the trial, and said that it was all untrue, and made to relieve himself from complicity in the offence, or in consequence of promises made to him, and threats held out against him; it was held, per *A. Wilson, J.*, that the prosecutor's counsel being called, and examined by the Judge presiding at the trial, was properly admitted to disprove the

(a) *Reg. v. Holmes*, L. R. 1 C. C. R. 334; *Rex v. Hodgson*, R. & R. 211; *Reg. v. Cockcroft*, 11 Cox, 410.

(b) *Reg. v. Brown*, L. R. 1 C. C. R. 70; 36 L. J. (M. C.) 59.

(c) *Reg. v. Brown*, 21 U. C. Q. B. 334, per *Robinson, C. J.*

witness's assertion above-mentioned, as to the manner in which, or the reason for which, this statement came to be made ; for the fact of its being obtained as he stated, or of his being so dealt or tampered with, would tend very much to prejudice the prosecution, and was, therefore, not a collateral matter, but relevant. But, per *Hagarty*, J., it was unnecessary and improper to call the prosecutor's counsel for this purpose, as the witness had already admitted his previous inconsistent statement, and his testimony on the trial would be sufficiently shaken by this admission. (a)

The prosecutor's counsel could not have been called to contradict the witness as to the facts sworn to on the trial, for a party was not allowed to discredit his own witness. But the facts relating to the issue might be proved by other witnesses, who were able to speak to them of their own knowledge, and so, incidentally, the witness might be contradicted. (b)

By the 32 & 33 Vic., c. 29, s. 68, in case a witness, in the opinion of the Court, proves adverse, the party producing him may contradict him by other evidence, or, by leave of the Court, may prove that the witness made, at other times, a statement inconsistent with his present testimony ; but, before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he did make such statement.

A witness should be interrogated as to facts only, and not as to matter of law. (c)

A skilled witness cannot, in strictness, be asked his opinion respecting the very point which the jury are to

(a) *Reg. v. Jerrett*, 22 U. C. Q. B. 499.

(b) *Ib.*

(c) *Reg. v. Massey*, 13 U. C. C. P. 484.

determine; but he may be asked a hypothetical question, which, in effect, will decide the same thing. (a)

Where, on a trial for murder, the Crown having made out a *prima facie* case, by circumstantial evidence, the prisoner's daughter, a girl of fourteen, was called on his behalf, and swore that she herself killed the deceased, by two blows with a stick, about two feet long, and one and a-half inches thick. In answer to this, a medical man, previously examined on the part of the Crown, was recalled, and asked whether the blows so inflicted by the prisoner's daughter would produce the fractures that were found on the head of the deceased. This question having been allowed, the answer was, "A stick such as she describes, one inch or an inch and a-half in thickness, and two feet long, could not, in my opinion, produce such extensive fractures by two blows: there must have been a greater number of blows to produce such fractures. There were bruises on both arms, head, and legs, and two blows could not have done all that. Deceased must have had a succession of blows from a larger instrument than the girl describes." It was objected that this was skilled evidence, and matter of opinion, when skilled evidence and matter of opinion were not admissible:—*Held* that the rule excluding a skilled witness from giving evidence on the point which the jury are to determine was not infringed, and that the medical testimony was material to enable the jury to determine the true cause of death. (b) *Held*, also, that this was not an informal or illegal way of impeaching the veracity of the prisoner's daughter, nor was the evidence collateral to the fact of killing, but was important, as testing the credibility of the witness. (c)

(a) *Reg. v. Jones*, 28 U. C. Q. B. 422, per *Richards*, C. J.

(b) *Reg. v. Jones*, *supra*, 416.

(c) *Ib.*

It is a general and well-established principle that the confession of a prisoner, in order to be admissible, must be free and voluntary. Any inducement to confess held out to the prisoner by a person in authority, or any undue compulsion upon him, will be sufficient to exclude the confession. The rule is carried so far that, if an oath is administered to the prisoner, while being examined under the 32 & 33 Vic., c. 30, s. 31, the oath will be a sufficient constraint or compulsion to render his statement inadmissible. (a)

The reasons for this are, the statements made on his examination are regarded as confessions which must be voluntary, and a statement under oath is not so regarded; secondly, a prisoner shall not be compelled to criminate himself, and to this it may be added, that it is harsh and inquisitorial, and for that reason should be rejected. (b)

This rule, however, only applies to the time during which the prisoner is under examination, as a *prisoner* on a charge against *himself*. His deposition, on oath, as a *witness* against another person, when voluntarily made, with the privilege of refusing to answer criminatory questions, is admissible against himself, if subsequently charged with a crime. (c)

The prisoner, after his committal for trial, and while in the custody of a constable, made a statement, upon which the latter took him before a Magistrate, when he laid an information, on oath, charging another person with having suggested the crime, and asked him to join in it, which he accordingly did. Upon the arrest of the accused, the prisoner made a full deposition against him, at the same time admitting his own guilt. Both information and deposition appeared to have been voluntarily

(a) *Reg. v. Field*, 16 U. C. C. P. 98.

(b) *Reg. v. Field*, *supra*, 101, per *Richards*, C. J.

(c) *Ib.*



made, uninfluenced by either hope or threat; but it also appeared that the prisoner had not been cautioned that his statement as to the other might be given in evidence against himself, though he had been duly cautioned when under examination in his own case.

On a case reserved as to the admissibility of the information and deposition, it was contended that they must be considered in the nature of a confession, and that, as it did not appear affirmatively that no inducements were held out by the constable, the information and deposition ought to have been excluded.

But the Court (adhering to *Reg. v. Finkle, infra*), held that both the information and deposition were properly received in evidence, as being statements which appeared to have been voluntarily made, uninfluenced by any promises, held out as an inducement to the prisoner to make them, and that, too, though they had been made under oath; for that the rule of law, excluding the sworn statements of a prisoner under examination, applied only to *his* examination on a charge against *himself*, and not when the charge was against another, after his own examination was concluded; for that, in the latter case, a prisoner was not obliged to say anything against himself, but, if he did volunteer such statement, it would be admissible in evidence against him. (a)

The prisoner was convicted of arson. His admission or confession was received in evidence, on the testimony of the constable, who said that, after the prisoner had been in a second time before the Coroner, he stated there was something more he could tell, whereupon the constable cautioned him not to say what was untrue. He then confessed the charge. The constable did not recollect any inducement being held out to him. There was

(a) *Reg. v. Field*, 16 U. C. C. P. 98.

also evidence that, on the third day of his incarceration, he expressed a wish to the Coroner to confess, on which the latter gave him the ordinary caution, that anything he said might be used against him, and not to say anything unless he wished. He then made a second statement, and, after an absence of a few minutes, returned, and made a full confession :—*Held*, that, on these facts appearing, the statement made to the constable was *prima facie* receivable, and that the Judge was well warranted in receiving as voluntary the confession made to the Coroner, after due warning by him.

To make this good evidence to go to the jury, it would seem, however, that the more reasonable rule is, that, notwithstanding the caution of the Magistrate, it is necessary, in the case of a second confession, not merely to caution the prisoner not to say anything to injure himself, but to inform him that the first statement cannot be used against him ; and if, in such case, the prisoner, after he has been cautioned, and his mind impressed with the idea that his prior statement cannot be used against him, still thinks fit to confess, the latter declaration is admissible.

If the confession is made after warning, when the person to whom it is made is not aware of any promises of favour by another person, the confession may be received ; for the accused might imagine that, having once confessed, it would be of no use to deny what he had once said, and no distance of time will cure the defect of want of previous caution.

But in this case, it afterwards appeared that the prosecutor had offered direct inducements to the prisoner to confess—promising to get up a petition in his favour, etc.—and the Court held, that, if the Judge was satisfied that the promise of favour thus held out had induced the

confession, and continued to act in the prisoner's mind, notwithstanding the warning of the Coroner, he was right in directing the jury to reject them. If, in the course of the examination of the witnesses for the prosecution, the Judge had suspected the confession had been obtained by undue influence, that suspicion ought to have been removed before the evidence was received. (a)

Examinations taken before a Commissioner in Bankruptcy are admissible in evidence against the prisoner examined on a criminal charge. (b)

The prisoner's house had been visited by a constable, who came to enquire about the purpose for which the prisoner's forge was used. The prisoner volunteered a statement, implicating himself and several others in a Fenian conspiracy. The constable asked the prisoner, "Had he any objection to tell that to the Superintendent?" The prisoner said, "No," and went to the Superintendent, and thence to a Magistrate, where he made a detailed information, upon oath, to the same effect. No inducement whatever was offered to the prisoner to make the information, but he was not cautioned by the Magistrate. Some days afterwards, he was asked by the constable to come down and hear his information read, in the presence of the persons whom he had informed against, now in custody. He went down, and made a further information, and, on that occasion, made this statement, "I came to save myself." No caution was given on this occasion. The prisoner was bound over to prosecute, and the Magistrate considered him as an approver.

No charge was preferred against the prisoner up to this point, nor was he in custody. Subsequently, he

(a) *Reg. v. Finkle*, 15 U. C. C. P. 453.

(b) *Reg. v. Robinson*, L. R. 1 C. C. R. 80.

refused to prosecute, and was then arrested, tried, and convicted, his own information being put in evidence against him :—*Held*, (a) that the informations were not properly received, and that, therefore, the conviction was bad :—*Held*, by *Fitzgerald and Deasy*, B. B. that the first information was admissible, no intimation having been made by the prisoner of the expectation under which he made the admission, but that the second information was inadmissible. (b)

This case does not affect the position that the voluntary deposition of a witness, on oath, is admissible against him when subsequently charged with a crime. *O'Hagan*, J., expressly declares that the fact of its being made on oath would not render the deposition inadmissible, if made voluntarily and spontaneously. *Fitzgerald and Deasy*, B. B. held that the first deposition, on oath, was admissible, for no inducement was then held out, the witness not being considered an approver. In fact, the ground on which the depositions were rejected, by the majority of the Court, was, that the confession was made with the view and under the hope of being thereby permitted to turn King's evidence. (c)

A voluntary statement, made by a prisoner, in the presence of a Magistrate, upon an application for a remand, is admissible in evidence, although the statement was not taken down in writing, and no caution was given by the Magistrate to the effect prescribed by the (d) corresponding English section of the 32 & 33 Vic. c. 30, s. 31. (e)

Confessions to a constable, by an accused in his custody, were not admitted where the accused might be

(a) *Monahan*, C. J., and *Keogh*, J., *dissentientibus*.

(b) *Reg. v. Gillis*, 14 W. R. 845.

(c) See *Hall's case*, 2 Leach, C. C. 559; 3 Russ. Cr. 373.

(d) 11 & 12 Vic. c. 42, s. 18.

(e) *Reg. v. Strip*, 2 U. C. L. J. 137; Dears. 648; 25 L. J. (M. C.) 109.

under the influence of hopes held out; but admissions made the same day, to a physician, in the absence of the constable, were admitted. (a)

Statements made by a prisoner to parties who arrested him, he having been previously told on what charge they arrested him, are evidence. (b)

The prisoner was called up by his master, and told, "You are in the presence of two police officers, and I should advise you, that, to any question that may be put to you, you will answer truthfully, so that, if you have committed a fault, you may not add to it, by stating what is untrue." The master afterwards added, "Take care; we know more than you think"—*Held*, that the words imported only advice on moral grounds, and that the statement was admissible against the prisoner on his trial for larceny. (c)

The case would have been different if it had appeared that the words used were, "It is better for you to tell the truth." (d)

The prisoners, two children—one aged eight, and the other a little older—were tried for attempting to obstruct a railway train. It was proved that the mothers of the prisoners, and a policeman, being present, after they had been apprehended on suspicion, the mother of one of the prisoners said, "You had better, as good boys, tell the truth." Whereupon both the prisoners confessed:—*Held*, that this confession was admissible in evidence against the prisoners. (e)

Upon an indictment of two brothers—J. for stealing, and G. for receiving—it was proved that J. and a third brother, W., were in the service of the same master; that

(a) *Reg. v. Berube*, 3 L. C. R. 212.

(b) *Reg. v. Tufford*, 8 U. C. C. P. 81.

(c) *Reg. v. Jarvis* L. R. 1 C. C. R. 96.

(d) See *Reg. v. Baldry*, 2 Den. C. C. 430.

(e) *Reg. v. Reeve*, L. R. 1 C. C. R. 362.

J., G., and W., were at G.'s house when a policeman found the stolen goods there, and sent for J. and G.'s master, and the five having gone together into G.'s parlour, charged W. and J. with stealing, and G. with receiving; that, upon this, W. said, "Well, J., you had better tell Mr. W. (their master) the truth." Neither the master nor the policeman dissented, nor made any remark, whereupon J. confessed. On his way to the station, J., of his own accord, made a further confession. Upon being taken before the Magistrates, they discharged W., but committed J. and G. for trial:—*Held* J. and G., having been convicted on the evidence above, that the conviction was right. (a)

A confession is admissible in evidence made to one in authority, although the prisoner was immediately, before such confession, in the custody of another person not produced, and although it is not shewn that such person did not hold out a threat or inducement. The rule is that for the purpose of introducing a confession in evidence, it is unnecessary, in general, to do more than negative any promise or inducement held out by the person, to whom the confession was made. If, however, there be any probable ground to suspect collusion, in obtaining the confession such suspicion, it is said, ought in the first instance to be removed. (b)

It may be generally laid down that, though an inducement has been held out by an officer or prosecutor or the like, and, though a confession has been made in consequences of such inducement, still if the prisoner be subsequently warned by a person in equal, or superior authority that what he may say, will be evidence against himself, or that a confession will be of no benefit to him,

(a) *Reg. v. Parker*, 8 U. C. L. J. 139; L. & C. 42; 30 L. J. (M. C.) 144.

(b) *Reg. v. Finkle*, 15 U. C. C. P. 455, per *Richards*, C. J.; *Phillips*, Ev. 430; and see *R. v. Clewes*, 4 C. & P. 221.

or if he be simply cautioned by the Magistrate, not to say anything against himself, any admission of guilt, afterwards made, will be received as a voluntary confession. More doubt may be entertained as to the law, if the promise has proceeded from a person of superior authority, as a Magistrate, and the confession is afterwards made to the inferior officer; because a caution from the latter person might be insufficient to efface the expectation of mercy, which had had been previously raised in the prisoner's mind. (a)

It is for the Judge to decide whether the prisoner has been induced to confess, by undue influence or not. (b) The confession of a third person is not sufficient to implicate a party, on a charge of stealing. (c)

The jury are not bound to believe the whole statements of a prisoner, in making a confession. The exculpatory, as well as the implicative, portions thereof, should be left to the jury, and they must exercise their own judgment as to whether they believe the whole, or only a part, (d)

The correct course to be taken by the Judge, when evidence has been received, which it is afterwards shewn not to be properly receivable, is to treat it as if it had been inadmissible in the first instance, and the effectual way of doing this is to tell the jury not to consider the inadmissible evidence, and to dispose of the case on the other evidence; a similar principle is acted on, when the names of other prisoners are mentioned in confession, and the proper course seems to be to read the names in full, the Judge directing the jury, not to pay any attention to them. (e)

(a) *Reg. v. Finkle*, 15 U. C. C. P. 457, per *Richards*, C. J.

(b) *Ib.* 453; *R. v. Garner*, 1 Den. C. C. 329.

(c) *Blair v. Hopkins*, 1 Kerr, 540.

(d) *Reg. v. Jones*, 28 U. C. Q. B. 416.

(e) *Reg. v. Finkle*, 15 U. C. C. P. 459, per *Richards*, C. J.; *Rex v. Jones*, 4 C. & P. 217; *Rex v. Mandesley*, 2 Lew. C. C. 73.

The inclination of the Courts is not to extend the rule for excluding confessions. (a)

Where a prisoner is willing to make a statement; it is the Magistrate's duty to receive it; but he ought, before doing so, entirely to get rid of any impression that may have been on the prisoner's mind that the statement may be used for his own benefit, and he ought also to be told that what he thinks fit to say will be taken down, and may be used against him on his trial. (b) The mode of doing this is now prescribed in terms, by the 32 & 33 Vic., c. 30, S. s. 31 and 32. The caution or explanation contained in s. 32 is not necessary, unless it appears that some inducement or threat has previously been held out to the accused. (c)

The 66th section of the Statute declares that the several forms given in the schedule, or forms to the like effect, shall be good, valid and sufficient in law. The form N., of the statement of the accused before the Magistrate, contains the cautions specified in s. 31, and not that in s. 32. Therefore, a statement returned, purporting to be signed by the Magistrate, and bearing, on the face of it, the caution provided for by s. 31, is admissible by virtue of s. 34, without further proof. (d)

The object of taking depositions, under the 32 & 33 Vic., c. 30, is not to afford information to the prisoner, but to preserve the evidence, if any of the witnesses is unable to attend the trial or dies. This being the ground on which they are taken, until recently the prisoner had no right to see them. (e) Now he is entitled to inspect the depositions, that he may know why he is committed. (f)

(a) *Reg. v. Finkle*, 15 U. C. C. P. 459.

(b) See *R. v. Arnold*, 8 C. & P. 621; Arch. Cr. Pldg. 226.

(c) *Reg. v. Sansome*, 1 Den. 545; 19 L. J. (M. C.) 143.

(d) *Ib.*; See *Reg. v. Bond*, 1 Den. 517; 19 L. J. (M. C.) 138; Arch. Cr. Pldg. 228.

(e) *Reg. v. Hamilton*, 16 U. C. C. P. 364, per *Richards*, C. J.

(f) *Ib.*; 32 & 33 Vic. c. 29, s 46.



It is not incumbent on the prosecution to abstain from giving any additional evidence, discovered subsequently to the taking of depositions ; but it is only fair that the prisoner's counsel should be apprised of the character of such evidence. (a)

It would seem that depositions taken before a Coroner can only be proved by the Coroner himself, or by proving his signature thereto, and showing by his clerk, or by some person who was present at the enquiry, that the forms of law have been duly complied with. (b)

It was not however necessary to prove depositions by the Magistrate, or his clerk, when taken before Justices of the Peace ; though, it was intimated that, in important cases, it would be better if they were present at the trial. (c)

Now, an examination taken, under the 31 & 82 Vic., c. 30, may be given in evidence without further proof, unless it be proved that the Justice purporting to have signed the same, did not in fact sign the same. (d) The signature of the prisoner is not absolutely necessary. The effect of the Statute, so far as regards the evidence of a confession, seems to be that a written examination, taken as the Statute directs, is evidence *per se*, and the only admissible evidence of the deponents having made a declaration of the things therein contained. (e)

The Statute authorizes the reading of the depositions before the Grand Jury, for the purpose of finding a bill, as well as before the petty jury at the trial. (f) In order, however, that the deposition may be admissible before the Grand Jury, the presiding Judge must, by evidence taken

(a) *Reg. v. Hamilton*, 16 U. C. C. P. 365, per *Richards*, C. J.

(b) *Reg. v. Hamilton*, *supra*, 340 ; *Taylor*, Ev. 473 ; *Reg. v. Wilshaw*, C. & Mar. 145.

(c) *Reg. v. Hamilton*, *supra*, 353, per *Richards*, C. J.

(d) S. 34.

(e) Arch. Cr. Pldg. 233.

(f) *Reg. v. Clements*, 2 Den. 251 ; 20 L. J. (M. C.) 193.

in the presence of the accused, satisfy himself of the existence of the facts required by the Statute to make such deposition admissible in evidence. (a)

Under the 32 & 33 Vic., c. 30, s. 29, it is not necessary that *each* deposition should be signed by the Justice taking it. Therefore, where a number of depositions, taken at the same hearing on several sheets of paper, were fastened together, and signed by the Justices taking them once only at the end of all the depositions, in the form given in the schedule (M):—*Held*, that one of the depositions was admissible in evidence, under s. 30 of this Act, after the death of the witness making it, although no part of it was on the sheet signed by the Justice. (b)

A deposition, properly taken, under 32 & 33 Vic., c. 30, s. 30, before a Magistrate, on a charge of feloniously wounding, is admissible in evidence against the prisoner on his trial for murder, the deponent having subsequently died of the wound. To render a deposition so taken admissible at the trial of a prisoner, it is not a condition that the charge, on which he is indicted, must be identically the same as that made against him before the magistrate, but the question is whether the charge was such that the prisoner had full opportunity, before the Magistrate for cross-examination, as to the circumstances appearing at the trial. (c)

Where a conviction for selling liquor without license has been appealed to the General Sessions, the depositions of witnesses, upon whose evidence in the Police Court the appellant was convicted, are not admissible on the trial of such appeal, though the witnesses are then absent from the Province. (d)

(a) *Reg. v. Beaver*, 10 Cox, 274, per *Byles*, J.; Arch. Cr. Pldg. 250.

(b) *Reg. v. Parker*, L. R. 1 C. C. R. 225; 39 L. J. (M. C.) 60.; *Reg. v. Richards*, 4 F. & F. 860, overruled.

(c) *Reg. v. Beeston*, 1 U. C. L. J. 17; Dears. 405; 24 L. J. (M. C.) 5.

(d) *Re Brown*, 8 C. L. J. N. S. 81.

Formerly depositions were receivable only where the indictment was substantially for the *same offence* as that with which the defendant was charged before the Justice. (a) Now, by the 32 & 33 Vic., c. 29, s. 58, depositions, taken in the preliminary or other investigation of any charge against any person, may be read as evidence in the prosecution of such person for any *other offence* whatsoever.

Upon the trial of the prisoner for obtaining money by false pretences, it was proved, by a female servant and the brother of the prosecutrix, that she was daily expecting her confinement, and the latter stated that she was "poorly otherwise," and was, therefore, too ill to travel : —*Held*, upon this evidence, the Statute 32 & 33 Vic., c. 30, s. 30, authorized the presiding Judge to receive the depositions of the prosecutrix, taken before the committing Magistrate; that there may be incidents with regard to parturition to bring the case within the Statute; that it is in the discretion of the presiding Judge to determine whether the evidence of illness is sufficient; that it is not necessary, in such case, to produce medical evidence. (b)

The statement of a deceased witness, taken on oath by a Magistrate, detailing the circumstances under which a felony was committed, is admissible in evidence on the trial, under the (N. B.) 1 Rev. Stat., c. 156, s. 7, though it is headed "the complaint of," etc., instead of "the examination" of the deceased, and does not state, on its face, to have been taken in the presence of the accused, it being proved that it was taken in his presence. (c)

Upon an indictment for obtaining money, from H., by false pretences, it appeared that the defendant was em-

(a) See *Reg. v. Beeston*, 1 U. C. L. J. 17; Dears. 405; *Reg. v. Ledbetter*, 3 C. & K. 108.

(b) *Reg. v. Stevenson*, 9 U. C. L. J. 139; L. & C. 165; 31 L. J. (M. C.) 147. See, however, *Reg. v. Welton*, 9 Cox, 296.

(c) *Reg. v. Millar*, Sup. Ct. N. B., H. T., 1861.

ployed to take orders for goods, but had no authority to receive the price, and that, eleven days after he was so employed, he obtained the money from H. by representing that he was authorized by his employer to receive it for goods delivered, in pursuance of an order which the defendant had taken. Evidence of an obtaining by a similar representation from another person, within a few days of the time when the moneys were obtained from H., not charged in the indictment, was tendered for the prosecution to prove the intent, and, after objection, admitted:—*Held*, that the evidence objected to was inadmissible. (a)

But where several felonies are connected together, and form part of one entire transaction, evidence of one is admissible to shew the character of the others. (b)

In criminal prosecutions for receiving stolen goods, knowing them to be stolen, or for passing counterfeit money or bills, witnesses are allowed to be called, on the part of the Crown, to speak to facts having no immediate connection with the case under trial, as, for instance, to prove that when the stolen goods, mentioned in the indictment, were found in possession of the prisoner there were found, also, in his possession various other articles that can be shewn to have been recently stolen from other people. So, in the case of persons who have passed counterfeit money or bills, when it is necessary to establish a guilty knowledge, on the part of the prisoner, the prosecutor is allowed to give evidence of the prisoner having, about the same time, passed other counterfeit money or bills, or had many such in his possession, which circumstances tend strongly to shew that he was not acting innocently, and had not taken the money cas-

(a) *Reg. v. Holt*, 8 U. C. L. J. 55; Bell, 280; 30 L. J. (M. C.) 11.

(b) *Clark v. Stevenson*, 24 U. C. Q. B. 209; *Rex v. Egerton*, Russ. & Ry. C. C. 375; *Rex v. Ellis*, 6 B. & C. 145.

ually, but that he was employed in fraudulently putting it off. (a)

Thus, upon a charge of uttering counterfeit coin, in order to prove guilty knowledge, evidence is admissible of a subsequent uttering by the prisoner of counterfeit coin of a different denomination. (b)

A false and fraudulent statement to a pawnbroker, that a chain offered as a pledge is of silver, is indictable under the 7 & 8 Geo. 4, c. 29, and, upon the trial of such an indictment, evidence is admissible of similar misrepresentations made to others about the same time, and of the possession of a considerable number of chains of the same kind. (c)

A declaration by a subscribing witness (who was dead) to a deed, that he left the country because he had forged a name thereto, is not admissible, on the ground that it is hearsay evidence. (d)

But the description, given by a person of his sufferings, whilst labouring under disease and pain, is not hearsay evidence, and will be admitted. (e)

When the prisoner was indicted, under the Con. Stats. Can., c. 98, s. 4, for setting fire to his own house, it was held that his verbal admissions that the house was insured were sufficient to prove that fact, though the policy was not produced, nor its non-production accounted for. (f)

The admissions proved were that the prisoner requested or procured one S. to set fire to the house, stating that he had his house insured, and asked him if he would not set fire to it. He also stated that "his insurance

(a) *Reg. v. Brown*, 21 U. C. Q. B. 335, per *Robinson*, C. J.

(b) *Reg. v. Foster*, 1 U. C. L. J. 156.

(c) *Reg. v. Roebuck*, 2 U. C. L. J. 138; *Dears. & B.* 24; 25 L. J. (M. C.) 101.

(d) *Rose v. Cuyler*, 27 U. C. Q. B. 270.

(e) *Reg. v. Berube*, 3 L. C. R. 212.

(f) *Reg. v. Bryans*, 12 U. C. C. P. 161.

would run out next day, and that he, S., must set fire to the house that night." The prisoner afterwards told S. "that he must set fire to the building before noon, for that his insurance would then expire." The evidence also shewed that a sum had been awarded to the prisoner for his insurance, in payment of which he was seen to have a bill of exchange on London in his possession. (a)

The prisoner, a solicitor, was indicted for perjury, in having sworn that there was no draft of a certain statutory declaration made by a client. No notice to produce the draft had been given to the prisoner, and upon his trial it was proved to have been last seen in his possession. Secondary evidence having been given of its contents:—*Held*, that, in the absence of such notice, secondary evidence was inadmissible. (b) The form of an indictment for perjury does not convey sufficient notice to the prisoner to produce the document to dispense with a notice to produce. (c)

A dying declaration is only admissible in evidence where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declaration. (d)

Therefore, upon an indictment for using instruments, with intent to procure abortion, the dying declaration of the woman was held inadmissible. (e)

The question whether a dying declaration is admissible is for the consideration of the Judge who tries the case, but the weight of it is for the jury. (f)

To render the proof of a declaration admissible as a dying declaration, there must be proof that the person

(a) *Reg. v. Bryans*, 12 U. C. C. P. 161.

(b) *Reg. v. Elworthy*, L. R. 1 C. C. R. 103; 37 L. J. (M. C.) 3.

(c) *Ib.*; See *Kalar v. Cornwall*, 8 U. C. Q. B. 168.

(d) *Reg. v. Mead*, 2 B. & C. 605, per *Abbott*, C. J.

(e) *Reg. v. Hind*, 7 U. C. L. J. 51; Bell, 253; 29 L. J. (M. C.) 147.

(f) *Reg. v. Charlotte Smith*, 13 W. R. 816.

who made it was, at the time, under the impression of almost immediate dissolution, and entertained no hope of recovery.

Vague and general expressions, such as "I will die of it!" "I will not recover!" "It is all over with me!" are insufficient to allow the proof of the declaration of a deceased person. (a)

The result of the decisions as to the admissibility of dying declarations is, that there must be an unqualified belief in the nearness of death; a belief, without hope, that the declarant is about to die; and the burden of proving the facts that render the declaration admissible is upon the prosecution. (b)

It is said that dying declarations ought to be admitted with scrupulous and almost superstitious care. They have not necessarily the sanction of an oath; they are made in the absence of the prisoner; the person making them is not subjected to cross-examination, and is in no peril of prosecution for perjury. There is also great danger of omissions and immaterial misrepresentations, both by the declarant and the witness. (c) The statements may be incomplete, and, though true as far as they go, may not constitute the whole truth. They may be fabricated, and their truth or falsehood cannot be ascertained; and experience shews that implicit reliance cannot, in all cases, be placed in the declarations of a dying man, for his body may have survived the powers of his mind or his recollection, if his senses are not impaired by pain, or otherwise may not be perfect, or for the sake of ease and to be rid of the importunity of those around him, he may say, or seem to say, whatever they suggest. (d)

(a) *Reg. v. Peltier*, 4 L. C. R. 3.

(b) *Reg. v. Jenkins*, L. R. 1 C. C. R. 192, per *Kelly*, C. B.

(c) *Ib.* 193, per *Byles*, J.

(d) *Re Anderson*, 20 U. C. Q. B. 181, per *M'Lean*, J.

On a trial for murder, a written declaration of the deceased was put in evidence for the prosecution. The declaration was made on oath to a Magistrate's clerk about thirteen hours before death. The clerk asked the deceased, before he took down her statement, whether she felt she was likely to die. She said "I think so from the shortness of my breath." Her breath was then extremely short, and her answers were disjointed from its shortness. The Clerk said, "Is it with the fear of death before you that you make these statements, and have you any present hope of your recovery?" She said "None." The Clerk then wrote out her statement, and added to it the above conversation, in the form of a statement by the deceased, but he omitted the word "present" before "hope." He then read over to the deceased what he had written, and she then added the words "at present" after "hope," and signed the declaration:—*Held*, that the statement was not admissible in evidence, as it did not appear to have been made under a settled hopeless expectation of death, inasmuch as the deceased had expressly qualified the words "no hope" by inserting after them the words "at present." (a)

In a prosecution for selling liquor without licence, under the Con. Stats. L. C., c. 6, s. 32, it is not necessary that the person who bought the liquor should be produced as a witness. It is sufficient to call a person who saw the sale, and saw what was paid. Nor is it necessary to call the person to whom the liquor was sold to prove that it was "fermented" liquor. A person who tasted the liquor may prove this. (b)

A conviction, made by a Justice of the Peace, when duly returned, according to the Statute, to the Court of

(a) *Reg. v. Jenkins*, L. R. 1 C. C. R. 187 ; 38 L. J. (M. C.) 82.

(b) *Thompson and Durnford*, 12 L. C. J. 285.



Quarter Sessions, and filed by the Clerk of the Peace, becomes a record of that Court, and may be proved as any other similar record without producing the original. (a)

A conviction, by a Justice, for an assault and battery is a record, and a record of our own country, and so not proveable when directly denied by an examined copy, as in the case of a foreign judgment, but by the production of the record itself. The course in such case is to produce the original record of conviction, which may be made up by the Justice at any time, and may be procured upon a writ of *certiorari* from this Court, either to the Justice or to the Quarter Sessions, if the record has been returned thither. Or, perhaps, it may be produced (when it can be so obtained) without the formality of a writ of *certiorari*.

In case of the death of the Justice who made the conviction, the writ may go to his executor. (b)

There is a well-settled distinction between proving the record of a different Court, from that in which the evidence is offered, and a record of the same Court. A Court will look at its own minutes, while sitting under the same Commission, when another Court would require more formal proof. (c)

The minutes of a Court of General Quarter Sessions are, in themselves, evidence, in the same Court, of the facts therein stated, without any other proof that the matter there recorded took place. Therefore, a recognizance, in a case of bastardy, taken under the Act 2 Vic., c. 42, before the Court itself, in open Court, is proved by the production of the minutes of the Sessions containing the entry. (d)

(a) *Graham v. M<sup>r</sup> Arthur*, 25 U. C. Q. B. 484, n.

(b) *Thomson v. Leslie*, 9 U. C. Q. B. 360.

(c) *Neill v. McMillan*, 25 U. C. Q. B. 494, per *Draper*, C. J.

(d) *Ex parte Daley*, 1 Allen, 424.

When a record of acquittal or conviction is produced at *nisi prius*, the Court cannot enquire into the circumstances under which it is brought forward.

In a case of felony, as well as misdemeanor, a copy of the record of acquittal may be, and, indeed, must be, received in evidence when offered, without its being necessary to shew that an order of a Judge has been obtained, sanctioning the delivery of a copy, though it seems the officer having the custody of the records should not deliver it without an order. (a)

Where a conviction has been returned to the Sessions, and filed by the Clerk of the Peace, but quashed on appeal afterwards made to the Sessions, the quashing may be proved by an order under the seal of that Court, signed by its clerk, directing that the conviction should be quashed the conviction itself being in evidence, and the connection between it and the order being shewn. (b) After the return of the conviction, it becomes a record, and may be proved as other records.

It is not necessary to make up a formal record of the judgment on the appeal, for the Con. Stats. U. C., c. 114, enables the Court of Quarter Sessions to dispose of the conviction, "by such order as to the Court shall see meet."

It would seem that the minute book of the Sessions, having an apparently proper caption, and signed by the Clerk of the Peace, would not be sufficient proof *per se* of the judgment of the Court quashing the conviction without proof of the order following it; but, if the further proof were added that, in practice, no other record is kept or made up, the minute book would be evidence. So the minute book would be evidence as to indictments,

(a) *Lusty v. Magrath*, 6 U. C. Q. B. O. S. 340.

(b) *Neill v. McMillan*, 25 U. C. Q. B. 485.

verdicts, and judgments in criminal matters, at the sessions. (a)

A conviction, before a Police Magistrate, can only be proved by the production of the record of the conviction, or an examined copy of it. Where a Police Magistrate, after hearing a case of common assault, ordered the accused to enter into a recognizance and pay the recognizance fee, but did not order him to be imprisoned, or to pay any fine :—*Held*, that this was not a conviction within the corresponding English section of the 32 & 33 Vic., c. 20, s. 45, and secondly, if a conviction, it was not proved by the magistrate's clerk stating the above facts, without producing a record of the proceedings. (b)

An information, and other proceedings before a Justice of the Peace, returned to the Supreme Court with a *certiorari*, and filed with the Clerk of the Crown, becomes a record, and may be proved by an examined copy taken before the original was filed. (c)

To prove the finding of an indictment at the Sessions, it is not sufficient to produce an exemplification of the record of acquittal, without any general heading or caption to it, (d) and it would seem the proper way of proving it is to have the record regularly drawn up, and produce an examined copy. (e)

The production of the original indictment is insufficient to prove an indictment for felony, and a record shewing a proper caption must be made up. (f)

A judgment of the Court of Quarter Sessions, affirming a conviction of the defendant before a Magistrate, on a charge of assaulting H. M., "by using insulting and abu-

(a) *Neill v. McMillan*, 25 U. C. Q. B. 494, per *Draper*, C. J.

(b) *Hartley v. Hindmarsh*, L. R. 1 C. P. 553.

(c) *Sewell v. Olive*, 4 Allen, 394.

(d) *Aston v. Wright*, 13 U. C. C. P. 14.

(e) *Ib.* 19, per *Draper*, C. J.

(f) *Henry v. Little*, 11 U. C. Q. B. 296; *Rex v. Smith*, 8 B. & C. 341. See also on this 32 & 33 Vic. c. 29, s. 77.

sive language to him, in his own office and on the public street, and by using his fist in a threatening and menacing manner to the face and head of the said H. M.," is sufficient proof of a breach of the peace. (a)

The Court will judicially notice a public Statute. (b) By the Interpretation Act, 31 Vic., c. 1, s. 7, thirty-eighthly every Act shall be deemed to be a Public Act, and shall be judicially noticed by all Judges, Justices of the Peace and others without being specially pleaded, and all copies of Acts public or private, printed by the Queen's Printer, shall be evidence of such Acts and of their contents, and every copy purporting to be printed by the Queen's Printer shall be deemed to be so printed, unless the contrary be shewn.

Where an Act of Parliament makes a Gazette evidence if it purport to be printed "by the Queen's Printer," or "by the Queen's Authority," a Gazette purporting to be printed by A. B., without giving his style as Queen's Printer, and purporting to be printed "by authority," is not receivable: *quære* would evidence *aliunde* be admissible to shew that A. B. was the Queen's Printer, and that the authority was the Queen's Authority. (c)

On a charge of murder, threats made by the prisoner to a third person, more than six months before the commission of the crime, that the prisoner would take the law into his own hands are clearly admissible, though, there are friendly relations between the parties, afterwards, and, if undue prominence is given to these threats in the charge to the jury, the prisoner's counsel should call the attention of the Court to it, and request that the jury

(a) *Reg. v. Harmer*, 17 U. C. Q. B. 555.

(b) See *Reg. v. Shaw*, 23 U. C. Q. B. 616.

(c) *Reg. v. Wallace*, 2 U. C. L. J. N. S. 138; 10 Cox, 500.

should be told that, if there were subsequent acts of kindness and expressions of friendliness, they would raise a presumption of kindness to rebut that of malice. (a) The reception of evidence in reply is as a general rule in the discretion of the Judge, subject to be reviewed by the Court. Evidence in explanation of some matter, brought out by the prisoner's witnesses, is properly received in reply. (b)

According to the strict practice, a party cannot, after closing his case, put in any evidence, unless by permission of the Judge. (c)

In an action for libel, the plaintiff cannot, after closing his case, have a paper, which he proved before, read and filed, except in the discretion of the Judge trying the case. (d)

Before the 32 & 33 Vic., c. 29, s. 80, did away with the granting of new trials in criminal cases, it was held that the rule is the same in the latter as in civil cases ; at any rate, where the prisoner is defended by counsel, that any objection to the charge of the presiding Judge, either for non-direction or for mis-direction, must be taken at the trial, when it can be directly cured ; and if not then taken, it cannot be afterwards raised on motion for new trial, or otherwise, especially when the evidence fully sustains the verdict—that non-direction is not an available objection when the verdict is not against evidence ; and where the law is clear, it is no mis-direction to leave the facts simply to the jury, for they are judges of the evidence—that mis-direction could only be on a point of law, and not on a matter of fact. (e)

(a) *Reg. v. Jones*, 28 U. C. Q. B. 416.

(b) *Ib.*

(c) *Cross v. Richardson*, 13 U. C. C. P. 433.

(d) *Ib.*

(e) *Reg. v. Fick*, 16 U. C. C. P. 379. See also *Cousins v. Merrill*, 16 U. C. C. P. 120.

The improper reception of evidence upon a criminal trial is not necessarily a ground for quashing the conviction, if the other evidence adduced be amply sufficient to sustain it. (a)

It would seem that, as the law now stands in Canada, when material evidence has been incorrectly admitted or rejected, or the verdict, though regularly obtained, is manifestly contrary to the evidence, the proper remedy for the prisoner is an application to the Crown for a pardon. (b)

A bill of exceptions will not lie in a criminal case. (c) It follows that, in a criminal case, a question as to the reception of evidence, or the rulings of the Judge thereon, or his directions to the jury, cannot be raised on the record, so as to constitute a ground of error; (d) for the effect of a bill of exceptions is to raise the point excepted to specifically on the record, so as to be subject to revision in error. (e)

An indictment in a criminal prosecution of the defendant is not admissible as evidence in a civil suit against him. (f)

The fabrication of evidence, by a prisoner or inducing a witness to swear in his favour, is most damaging to the prisoner's case. (g)

The reading to witnesses of the Judge's notes of their evidence, taken on a former trial, should be discouraged. Where, on a second trial, at the same sitting, before

(a) *Reg. v. Foster*, 1 U. C. L. J. 156.

(b) *Reg. v. Kennedy*, 2 Thomson, 216, per *Bliss*, J.; *ib.* 225, per *Wilkins*, J.

(c) *Whelan v. Reg.* 28 U. C. Q. B. 132, per *Draper*, C. J. (In *P. & A.*); *Reg. v. Pattee*, 5 U. C. P. R. 292; 7 C. L. J. N. S. 124, per *Dalton*, J.; *Dural dit Barbinais v. Reg.* 14 L. C. R. 74, per *Meredith*, J.; *ib.* 79, per *Dural*, C. J. (in error.)

(d) *Winsor v. Reg.* L. R. 1 Q. B. 312, per *Cockburn*, C. J.

(e) *Dural dit Barbinais v. Reg.* 14 L. C. R. 52.

(f) *Winning v. Fraser*, 12 L. C. J. 291.

(g) *Reg. v. Jones*, 28 U. C. Q. B. 416.

another jury, some of the witnesses having been re-sworn, the evidence given by them at the first trial was read over to them from the Judge's notes, liberty being given, both to the prosecution and to the prisoner, to examine and cross-examine the witnesses, it was held that this proceeding was irregular, and could not be cured by the consent of the prisoner. (a)

(a) *Reg. v. Bertrand*, L. R. 1 P. C. App. 520.

## CHAPTER IX.

## PLEADING.

AN indictment grounded upon an offence made by Act of Parliament must, by express words, bring the offence within the substantial description made in the Act. Those circumstances mentioned in the Statute to make up the offence shall not be supplied by any general conclusion *contra formam statuti*.

As to indictments in general, the charge must contain such a description of the injury or crime, that the *defendant* may know what injury or crime it is which he is called upon to answer; that the *jury* may appear to be warranted in their conclusions of guilty or not guilty upon the premises delivered to them; and that the *Court* may see such a definite injury or crime that they may apply the remedy or punishment which the law prescribes. The *certainty* essential to the charge consists of two parts—the *matter* to be charged, and the *manner* of charging it. As to the *matter* to be charged, whatever circumstances are necessary to constitute the crime imputed must be set out, and all beyond are surplusage. (a)

Where an offence is created by Statute, it is the safest rule to describe the offence in the very words used in the Statute, and the Courts are generally averse to support indictments where other words have been substituted. (b)

Where a Statute uses the word “maliciously” in de-

(a) *Reg. v. Tierney*, 29 U. C. Q. B. 184-5, per *Morrison*, J.

(b) *Reg. v. Jope*, 3 Allen, 162, per *Carter*, C. J.



scribing an offence, it is not sufficient to allege that it is done "feloniously," as the former expression is not included in the latter. Where a Statute uses the words "wilfully and maliciously," and the act is laid as done "unlawfully, maliciously, and feloniously," the word "wilfully" being omitted, the indictment is insufficient; for where both the words "wilfully" and "maliciously" are used, they must be understood as descriptive of the offence, and, therefore, necessary in describing the offence in an indictment. (a)

It is not sufficient for an indictment to follow the words of a Statute where the allegations submit a question of law for the jury to determine. It is not an universal rule that an offence may be described, in an indictment, in the words of the Statute which has created it; for an indictment charging that the defendant falsely pretended certain facts, although in the very language of the Statute, was held defective in error, for not averring specifically that the pretences were false. (b)

Where a Statute creates a new offence, under particular circumstances, without which the offence did not exist, all these circumstances ought to be stated in the indictment. The prisoner should be able to gather from the indictment whether he is charged with an offence at the common law, or under a Statute, or, if there should be several Statutes applicable to the subject, under which Statute he is charged. (c)

Where the offence charged is created by any Statute, or subjected to a greater degree of punishment by any Statute, the indictment shall, after verdict, be held sufficient, if it describes the offence in the words of the Statute creating the offence, or prescribing the punish-

(a) *Reg. v. Jope*, 3 Allen, 162-3, per Carter, C. J.

(b) *Reg. v. Switzer*, 14 U. C. C. P. 477; *Rex v. Perrott*, 2 M. & S. 379.

(c) *Reg. v. Cummings*, 4 U. C. L. J., 188, per Esten, V. C.

ment, although they be disjunctively stated, or appear to include more than one offence, or otherwise. (a)

It would appear, however, that this clause does not dispense with the necessity of stating the circumstances under which the offence was committed, and without which it could not have been committed. (b)

There are numerous instances where, the Statute being disjunctive, a conjunctive statement is commonly used in an indictment. Thus, the Statute 7 & 8 Geo 4, c. 30, enacts, that if any person shall unlawfully and maliciously cut, break, or destroy any threshing-machine, the indictment may charge that the accused did feloniously, unlawfully, and maliciously cut, break, *and* destroy. So, where the offence by Statute was unlawfully or maliciously breaking down, *or* cutting down, any sea bank, or sea wall, the indictment may charge a cutting *and* breaking down. (c) And the indictment will not be bad on the ground of its charging several offences.

In indictments for offences against the persons or property of individuals, the christian and surname of the party injured must be stated, if the party injured be known. (d)

Surplusage, or the allegation of unnecessary matter, will not vitiate an indictment at common law, or on a Statute. The unnecessary allegations need not be proved, and may be rejected, provided they are not matters of description, (e) and do not alter the meaning of the words requisite to define the offence charged. (f) Only material allegations need be proved. (g)

(a) *Reg. v. Baby*, 12 U. C. Q. B. 346 ; 32 & 33 Vic. c. 29, s. 79.

(b) *Reg. v. Cummings*, 4 U. C. L. J. 188, per *Esten*, V. C.

(c) *Reg. v. Patterson*, 27 U. C. Q. B. 145-6, per *Draper*, C. J.

(d) *Reg. v. Quinn*, 29 U. C. Q. B. 163, per *Richards*, C. J.

(e) *Reg. v. Bryans*, 12 U. C. C. P. 167, per *Draper*, C. J.

(f) *Reg. v. Bathgate*, 13 L. C. J. 304, per *Drummond*, J.

(g) *Reg. v. Bryans*, *supra*, 169, per *Richards*, C. J.

An indictment charged A. with having made a false declaration, before a Justice, that he had lost a pawn-broker's ticket, whereas he had not lost the ticket, but "had sold, lent, or deposited it with one C." :—*Held*, that the indictment was not bad for uncertainty, because the words "had sold, lent, or deposited" it were surplusage (a)

It is a universal principle, which runs through the whole criminal law, that it will be sufficient to prove so much of an indictment as charges the defendant with a substantive crime. (b)

The ordinary conclusion of an indictment for perjury, "did wilfully and corruptly commit wilful and corrupt perjury," may be rejected as surplusage. (c)

If the words "*contra formam statuti*" are improperly introduced into an indictment, they may be rejected as surplusage. (d)

The 32 & 33 Vic., c. 29, s. 23, enacts that no indictment shall be held insufficient for want of the averment of any matter unnecessary to be proved, or for the insertion of the words "against the form of the Statute," instead of the words "against the form of the Statutes," or *vice versa*; and s. 78 cures these defects after verdict.

The former Statute, 4 & 5 Vic., c. 24, s. 26, contained language somewhat similar to s. 78 of the present Act. It only, however, purported to cure the *insertion* of the words "against the form of the Statute," instead of the words "against the form of the Statutes." The present Act cures the *omission* of these words.

An indictment on the former Statute, for receiving

(a) *Reg. v. Parker*, L. R. 1 C. C. R. 225; 39 L. J. (M. C.) 60.

(b) *Reg. v. Bryans*, 12 U. C. C. P. 167, per *Draper*, C. J.

(c) *Reg. v. Hodgkiss*, L. R. 1 C. C. R. 213, per *Kelly*, C. B; *Ryalls v. Reg.* 11 Q. B. 781.

(d) *Reg. v. Cummings*, 4 U. C. L. J. 185, per *Draper*, C. J.; *Rex v. Matthews*, 5 T. R. 162; see also *Reg. v. Huntley*, 6 U. C. L. J. 262; Bell 238.

stolen bank notes, which did not conclude "*contra formam statuti*," was held bad; for it was quite clear that, but for the Statute which made it an offence to steal bank notes, it could be no crime to receive them, knowing them to be stolen. (a)

So an indictment for obtaining money by false pretences, when such pretences came clearly within the Statute, and would not be indictable at common law, must have concluded "*contra formam statuti*." (b)

The general rule was, that, in indictments for offences created by Statute, the conclusion "*contra formam statuti*" was necessary. It was pretty clear, however, that, under the old Statutes, the omission of these words was not fatal after verdict, though it might, perhaps, have been on demurrer. (c)

There seems now no doubt that an indictment following the forms contained in the 32 & 33 Vic., c. 29, sched. A., will be sufficient, whether on demurrer, or after verdict, although it does not conclude against the form of the Statute or Statutes. (d)

Even if the omission of these words is a defect, it can only be objected to by demurrer, or motion to quash the indictment, before the defendant has pleaded. (e)

Where there were two or more Statutes distinct and separate, and not cumulative, an indictment concluding against the form of the Statutes would have been demurrable for uncertainty; but if, in such case, it concluded against the form of the Statute, it would not be demurrable, being good on the face of it, and the only question would be, to what Statute did it relate. (f)

(a) *Reg. v. Deane*, 10 U. C. Q. B. 464.

(b) *Reg. v. Walker*, 10 U. C. Q. B. 465.

(c) *Reg. v. Cummings*, 16 U. C. Q. B. 15; confirmed on appeal, 4 U. C. L. J. 182; *Reg. v. Tweedy*, 23 U. C. Q. B. 120, per *Draper*, C. J.

(d) See *Reg. v. Cummings*, *supra*; 32 & 33 Vic. c. 29, s. 23 and 78.

(e) *Reg. v. Cummings*, *supra*, 184, per *Draper*, C. J.; 32 & 33 Vic., c. 29, s. 32.

(f) *Ib.* 187, per *Macaulay*, C. J.

If an indictment conclude against a particular Statute, it would be good; but, in such case, it would be demurrable, if it did not follow the language of the Statute, and saying that it was against the Statute, without stating a case that came within it, could not cure the objection. (a)

The general rule of law is, that no person shall be twice placed in legal peril of a conviction for the same offence. Consequently, on an indictment for any offence, a previous conviction, or acquittal of the same offence, may be a good plea in bar. The true test by which the validity of such a plea may be ascertained is, whether the evidence necessary to sustain the second indictment would have warranted a legal conviction upon the first. (b)

The prisoner must be in legal peril on the first indictment, and the principle is well established that, unless the first indictment was such that the prisoner might have been convicted upon it, on proof of the facts contained in the second indictment, an acquittal on the first can be no bar to the second. (c)

Where A., being charged as the reputed father of a bastard child, of which B. was then pregnant, appeared at the January Sessions and denied the charge. B. was then sworn as a witness, but, it appearing to the Sessions that she did not understand the nature of an oath, the case was dismissed, and A.'s sureties discharged. After the birth of the child, A. was again charged, before a subsequent Sessions, with being the father, and pleaded *antrefois acquit* :—*Held*, (Parker, J., *dubitante*, and Ritchie, J., *dissentiente*) that the January Sessions had power to try whether A. was the father or not, though

(a) *Reg. v. Cummings*, 4 U. C. L. J. 187, per Macaulay, C. J.

(b) See *Reg. v. Magrath*, 26 U. C. Q. B. 385.

(c) *Ex parte Estabrooks*, 4 Allen, 280, per Wilmot, J.

they could not make an order of filiation till the child was born, and that, therefore, A. being once acquitted by a tribunal having legal authority to try the offence, he could not again be imperilled for the same offence. (a)

When, with reference to these pleas, it is said that a man is twice tried, a trial which proceeds to its legitimate and lawful conclusion by verdict, is meant. When a man is said to be twice put in jeopardy, it signifies a putting in jeopardy by the verdict of a jury, and that he is not tried nor put in jeopardy until the verdict comes to pass; because if that were not so it is clear that in every case of defective verdict a man could not be tried a second time, and yet it is admitted that, in the case of a verdict palpably defective, though the jury have pronounced upon the case, yet it will not avail the party, if a second time put on trial. (b)

A party is not necessarily in jeopardy when a jury is sworn and evidence given. The true and rational doctrine is that, where a trial proves abortive by reason of no legal verdict having been given, the acquittal is no bar to a subsequent indictment, and a *venire de novo* may be awarded. (c)

A party is not in jeopardy, in the legal sense of the word, if there is a verdict against him on a bad indictment. (d) The rule means that a man shall not twice be put in peril, after a verdict has been returned by the jury, that verdict being given on a good indictment, and one on which the prisoner could be legally convicted and sentenced. (e)

Where a jurymen is taken ill, or some unforeseen ac-

(a) *Ex parte Estabrooks*, 4 Allen, 273.

(b) *Reg. v. Charlesworth*, 9 U. C. L. J. 49, per Cockburn, C. J.; 1 B. & S. 460; 31 L. J. (M. C.) 25; see also *Reg. v. Sullivan*, 15 U. C. Q. B. 199.

(c) *Ib.* 50, per Wightman, J.

(d) *Ib.* 51, per Crompton, J.

(e) *Winsor v. Reg.* L. R. 1 Q. B. 311, per Cockburn, C. J. See also *Reg. v. Magrath*, 26 U. C. Q. B. 385.

cident occurs, which would be within the ordinary excepted cases in which a jury may properly be discharged, or the jury give an imperfect verdict, or one which cannot be supported in point of law, a *venire de novo* may be awarded, and the defendant cannot plead *autrefois acquit*, because he has not been in legal jeopardy. (a)

These are the only pleas known to the law of England to stay a man from being tried on an indictment or information. (b)

If the prisoner might have been convicted upon the first indictment, though, in fact, he was acquitted by a mistaken direction of the Judge, he may plead *autrefois acquit*.

If A. commits a burglary, and at the same time steals goods out of the house, if he be indicted for the larceny only and be acquitted, yet he may be indicted for the burglary afterwards, and *e converso* if indicted for the burglary, with intent to commit larceny, and he be acquitted, yet he may be indicted of the larceny, for they are several offences, though committed at the same time. A man, acquitted of stealing the horse, may be convicted of stealing the saddle, though both were done at the same time. (c)

It would seem that in all cases where, by our Statute Law, a prisoner, indicted for one offence, is liable to be convicted of another, an acquittal or conviction of the former would be a good bar to an indictment for the latter. (d)

In fact, s. 52 of the 32 & 33 Vic., c. 29, provides that no person shall be tried or prosecuted for an attempt to commit any felony or misdemeanor, who has been previously

(a) *Reg. v. Charlesworth*, 9 U. C. L. J. 50, per *Wightman*, J.

(b) *Winsor v. Reg.*, L. R. 1 Q. B. 314, per *Blackburn*, J.; *Reg. v. Charlesworth*, *supra*, 49, per *Cockburn*, C. J.

(c) *Reg. v. Magrath*, 26 U. C. Q. B. 388 *et seq.* per *Draper*, C. J.

(d) See 32 & 33 Vic. c. 21, s. 74-99, c. 29, s. 49, 50, and 51.; and *Reg. v. Gorbutt*, *Dears. & B.* 166; 26 L. J. (M. C.) 47.

tried for committing the same offence. By this clause, the Legislature sanctions the application of the above principle to the particular case of an indictment for committing a felony or misdemeanor.

The pleas only apply where there has been a former judicial decision on the same accusation, in substance, and where the question in dispute has been already decided. (a)

A conviction for assault, the charge being of assault, by Justices in Petty Sessions, at the instance of the person assaulted, and imprisonment consequent thereon, are not, either at common law or under the 32 & 33 Vic., c. 20, s. 45, a bar to an indictment for manslaughter of the person assaulted, should he subsequently die from the effects of the assault. (b) The word "cause," in the section, must be read as synonymous with "accusation" or "charge," and, in this case, the accusation or charge was the assault. Consequently, a conviction therefor was only a bar to a subsequent indictment for the same offence.

The defendant entered into a recognizance to keep the peace and be of good behaviour towards Her Majesty and all her liege subjects. A *sci. fa.* was afterwards brought for breach of this recognizance, by committing an assault on one H. M., on the 4th of August, 1858. On the trial, a judgment of the Sessions, affirming the conviction of the defendant before Magistrates, for the same assault, was proved:—*Held*, that the conviction for the assault was not coextensive with all that was charged, as a breach, in the *sci. fa.*; that the 4 & 5 Vic., c. 27, s. 28, only protected from punishment, in any proceeding, for the same offence or the "same cause"; that the *sci. fa.* was

(a) *Reg. v. Morris*, L. R. 1 C. C. R. 94, per *Byles*, J.

(b) *Ib.* 90.



brought for violation of an express undertaking of record, into which the defendant had entered, and that, therefore, the conviction by the Magistrates did not bar the proceedings on the *sci.fa.* (a)

If a party be charged, before a Justice of the Peace, with an assault, and he dismisses the complaint, giving a certificate, under this clause, the defendant can avail himself of the certificate as a defence to an action for tearing the plaintiff's clothes, on the same occasion. (b)

An acquittal on an indictment for stealing goods, in which the ownership of the goods is not properly laid, is no bar to an indictment sufficiently laying the property. The prisoner having been indicted on a count stating the ownership of property stolen to be in the prosecutor's son, who was only fourteen years of age, and assisted his father without wages, was acquitted and a second indictment was then preferred, laying the ownership in the prosecutor, upon which the prisoner was convicted:—*Held*, that a plea of *autrefois acquit* could not be sustained, and that the conviction was right. (c) Where the prisoner is tried upon a good indictment for a charge of felony, before a competent tribunal, and has been given in charge to a jury, in due form of law empannelled, chosen and sworn, a new indictment against him may be defeated by a plea of *autrefois acquit*. (d)

If a plea of *autrefois acquit* or *convict* is overruled, the prisoner may plead not guilty, and be tried at the same Court of *oyer and terminer*. (e)

A plea of *autrefois convict* is not proved by the production of the record, and verdict endorsed. (f)

(a) *Reg. v. Harmer*, 17 U. C. Q. B. 555-8.

(b) *Julien v. King*, 17 L. C. R. 268.

(c) *R. v. Green*, 3 U. C. L. J. 19; Dears. & B. 113.

(d) *Reg. v. Murphy*, L. R. 2 P. C. App., 548, per Sir Wm. Erle.

(e) See *Reg. v. Magrath*, 26 U. C. Q. B. 385.

(f) *Re Warner*, 1 U. C. L. J. N. S. 18, per Hagarty, J.

A plea describing a Statute, as passed in the 4th and 5th years of the reign of Queen Victoria, is bad on demurrer. (a) It seems a demurrer must be to the entire count or plea, and not to part of it; and, if it is good upon the whole, anything else which it contains, which by itself would be insufficient, is mere surplusage. (b)

After a demurrer is overruled, to allow a party to plead not guilty is substantially correct, if regarded in what perhaps is the proper view to take of it, as an amendment allowed to the party before final Judgment. (c)

The first count of an indictment on the Con. Stats. Can. c. 6, s. 20, charged that the defendant, after having made the alphabetical list of persons entitled to vote, etc., made out a duplicate original of the said list, and certified by affirmation to its correctness, and delivered the same to the Clerk of the Peace, and that in making out the certified list, *so delivered to the Clerk of the Peace*, of persons entitled to vote, etc., the defendant did feloniously omit, from *said* list, the names, etc., which names or any or either of them, ought not to have been omitted. The second count was nearly the same as the first, the word "insert" being used where the word "omit" was used in the first. Upon demurrer to the indictment, the Court held that the omission charged, having been from the certified list delivered to the Clerk of the Peace, or "duplicate original" the words "*said list*" referring to the words "*the certified list so delivered to the Clerk of the Peace*" was a sufficient description to identify the list intended.

As to the objection that it did not appear that the persons whose names were charged to have been omitted, etc., were persons entitled to vote, etc.:—*Held*, that the words

(a) *Johnstone v. Odell*, 1 U. C. C. P., 406, per *McLean*, J.; *Huron D. C. v. London D. C.*, 4 U. C. Q. B. 303.

(b) *Mulcahy v. Reg.* L. R. 3 E. & I. App. 329, per *Ld. Cranworth*.

(c) *Ib.* 323, per *Willes*, J.

in the indictment were not a direct, and specific allegation that those persons were entitled to vote: as to an objection that it was not alleged that the list was made up from the last revised assessment roll, the Court held that by the indictment, it appeared that the assessment roll referred to was the assessment roll for 1863, and that it was sufficiently stated that the alphabetical list was made up for that year, and that the Crown would be bound to prove such a list:—*Held*, further, that both counts of the indictment were bad, as they should have shewn explicitly, how and in what respect these names should or should not have been on the list, by setting out that they were upon, or were not upon, the assessment roll as the case might be, or at any rate were, or were not, upon the alphabetical list. (a)

Matter of description, in an indictment, though unnecessarily alleged, must be proved as laid. Therefore, where, in an indictment for assaulting a game-keeper of the Duke of Cambridge, under 9 Geo. 4 c. 69, s. 2, the Duke was described as “George William Frederick Charles, Duke of Cambridge” and it was proved that “George William” were two of his names, but that he had other names which were not proved, and it was found by the verdict that the jury were satisfied of the identity of the Duke, and the prisoners were convicted:—*Held*, that the conviction was wrong; that under 14 & 15 Vic., c. 100, s. 24, an amendment might have been made at the trial, by which the conviction would have been supported by striking out all the Christian names; but it was now too late and that the Court of Quarter Sessions were not bound to amend: that an amendment, by striking out the two names only, which were not proved would have been wrong. (b)

(a) *Reg. v. Switzer*, 14 U. C. C. P. 470.

(b) *Reg. v. Frost*, 1 U. C. L. J. 135; *Dears.* 474; 24 L. J. (M. C.) 116.

An indictment could not be amended at common law, without the consent of the Grand Jury, on whose oath it was found. (a)

The 32 & 33 Vic., c. 29, s. 70, *et seq.* contains provisions as to the amendment of indictments in certain cases. It would seem that a defect, in laying the property in an indictment, might be amended under s. 71. (b) Under a section of an English Act, somewhat analogous to s. 71, it was held that the Judge had power to amend an indictment for perjury, describing the Justices, before whom the perjury was committed, as Justices for a county, where they were proved to be Justices for a borough only. (c)

Where an amendment has once been made, the case must be decided upon the indictment, in its amended form. (d)

The amendment must, in all cases, be made before verdict. (e)

It seems, however, that an amendment may be made, after the prisoner's counsel has addressed the jury. (f)

Upon an amendment of the indictment at the trial, no postponement of the trial will be granted, if the prisoner is not prejudiced in his defence. (g)

S. 72 of the 32 & 33 Vic., c. 29, enacts that after any such amendment, the trial shall proceed, whenever the same is proceeded with, in the same manner, and with the same consequences, both with respect to the liability of witnesses to be indicted for perjury, and in all other respects as if no such variance had occurred.

(a) *Re Conklin*, 31 U. C. Q. B. 167, per *Wilson*, J.

(b) *Reg. v. Jackson*, 19 U. C. C. P. 280; *Reg. v. Quinn*, 29 U. C. Q. B. 164, per *Richards*, C. J.

(c) *Reg. v. Western*, L. R. 1 C. C. R. 122; 37 L. J. (M. C.) 81.

(d) *Reg. v. Barnes*, L. R. 1 C. C. R. 45; 35 L. J. (M. C.) 204.

(e) *Reg. v. Frost*, Dears. 474; 24 L. J. (M. C.) 116; *Reg. v. Larkin*, Dears. 365; 23 L. J. (M. C.) 125.

(f) *Reg. v. Fullarton*, 6 Cox, 194; Arch. Cr. Pldg. 207; but see *Reg. v. Rymes*, 3 C. & K. 326.

(g) *Reg. v. Senecal*, 8 L. C. J. 287.

A count on an indictment charging a prisoner with unlawfully and carnally knowing and abusing a girl, under the 32 & 33 Vic., c. 20, s. 52, and also with an assault at common law, might be objectionable, on the ground of duplicity. (a)

Where different felonies are charged in different counts of an indictment, and an objection is taken to the indictment, on that ground, before the prisoner has pleaded, or the jury are charged, the Judge, in his discretion, may quash the indictment, or, if it be not discovered until after the jury are charged, the Judge may put the prosecutor to his election on which charge he will proceed. (b)

Counts under the 39 Geo. 3, c. 85, for embezzling bank notes, might have been joined with counts for larceny at common law, (c) and the prosecutor would not, at the opening of his case, have been put to his election as to whether he would proceed on the statutory or common law count, though he would have been limited to one state of facts relating to one single act of offence. (d)

But counts ought not to be joined in an indictment against a prisoner, for stealing and also for receiving, and the reason is, because they are, in fact, totally distinct offences, and the prisoner cannot be found guilty of both. But when the two facts charged form part of one and the same transaction, and are not repugnant, they may be properly joined, as in indictments for forgery, where one count is inserted for forgery, and another for uttering the forged instrument. (e)

It would seem that, where there is only one offence

(a) *Reg. v. Guthrie*, L. R. 1 C. C. R. 242, per *Bovill*, C. J.

(b) *Young v. R.* 3 T. R. 106; *Reg. v. Heywood*, L. & C. 451; 33 L. J. (M. C.) 133; Arch. Cr. Pldg. 70.

(c) *Rex v. Johnson*, 3 M. & S. 539.

(d) *Reg. v. Cummings*, 4 U. C. L. J. 184, per *Draper*, C. J.

(e) *Rex v. Blackson*, 8 C. & P. 43, per *Parke*, B.

charged, or *corpus delicti* complained of, the prosecutor cannot be put to his election, nor the indictment be quashed, though it contain several counts, all alleging the commission of the offence in different ways; in other words, it is not objectionable to vary the statement in the indictment, in order to meet the evidence. (a)

The indictment contained two counts—the first, embezzlement as servant, the second for larceny, as bailee. At the close of the case for the prosecution, it was objected that the indictment was bad, for misjoinder of counts, and that the Court had no power to allow the counsel for the prosecution to elect on which count he would proceed. The Court overruled the objection, and, the counsel for the prosecution having elected to proceed upon the second count, the prisoner was convicted:—*Held*, that the conviction must be affirmed. (b)

There is no objection to the joinder of counts for embezzlement and larceny as a servant, and on the latter count there may be a conviction for larceny as a bailee. (c)

It is not a misjoinder of counts to add statements of a previous conviction for misdemeanor, as counts to a count for larceny, under the 32 & 33 Vic., c. 21, s. 18; and the objection, at all events, could only be raised by demurrer, or motion to quash the indictment, pursuant to the 32 & 33 Vic. c. 29, s. 32. (d)

If the statements of the previous convictions are not treated as counts, but merely as statements made for the purpose of founding an enquiry to be entered into, only in the event of the prisoner being found guilty of the offence charged in the indictment; yet if they were not enquired into at all, and the jury was not charged with

(a) See *Reg. v. School*, 26 U. C. Q. B. 214; Arch. Cr. Pldg. 72.

(b) *Reg. v. Holman*, 9 U. C. L. J. 223; L. & C. 177; see also *Reg. v. Ferguson*, 1 U. C. L. J. 55; Dears. C. C. 427.

(c) 2 Russ. Cr. 247 n.

(d) *Reg. v. Mason*, 32 U. C. Q. B. 246; *Reg. v. Ferguson*, 1 Dears. 427.

them, so that the prisoner was not prejudiced by their insertion, and if, after a conviction on the count for larceny, a demurrer to these statements, as insufficient in law, is decided in favour of the prisoner, a court of error will not re-open the matter, on the suggestion that there is a misjoinder of counts. (a)

If there be an exception or proviso in the enacting clause of a Statute, it must be expressly negatived in the indictment. (b)

The rule is, that, when the enacting clause of a Statute constitutes an act to be an offence, under certain circumstances, and not under others, then, as the act is an offence only *sub modo*, the particular exceptions must be expressly specified, and negatived; but when a Statute constitutes an act to be an offence generally, and, in a subsequent clause, makes a proviso or exception in favour of particular cases, or in the same clause, but not in the enacting part of it, by words of reference, or otherwise, then the proviso is matter of defence or excuse, which need not be noticed in an indictment. (c)

The reason why the exceptions in the enacting clause should be negatived is because the party cannot plead to such an indictment, and can have no remedy against it, but from an exception to some defect appearing on the face of it. (d)

The statement of the time when an offence is committed was never considered material, so long as there was proof of the offence occurring before the preferring of the indictment. (e)

The 32 & 33 Vic., c. 29, s. 23, would seem to render an

(a) *Reg. v. Mason*, 32 U. C. Q. B. 246.

(b) *Reg. v. White*, 21 U. C. C. P. 354.

(c) *Ib.* 355, per Galt, J.

(d) *Ib.* 356, per Galt, J., and see Arch. Cr. Pldg. 62; *Spieres v. Parker*, 1 T. R. 141; *R. v. Earnshaw*, 15 Ea. 456; *Rex v. Hall*, 1 T. R. 320; *Steel v. Smith*, 1 B. & Ald. 94; *Dwarris*, 515-6.

(e) *Reg. v. Hamilton*, 16 U. C. C. P. 355, per Richards, C. J.

averment of time unnecessary, in any case where time is not of the essence of the offence. (a)

It was formerly necessary that an indictment for homicide should set forth the manner of the death, and the means by which it was effected. (b)

But it is not now necessary that an indictment for murder or manslaughter should set forth the means by which the death of the deceased was caused. When a Statute makes the means of effecting an act material ingredients in the offence, it is necessary that the means should be set out in the indictment; for an indictment must bring the fact of making an offence within all the material words of the Statute, and all necessary ingredients in the offence must be alleged. (c)

Where a Statute provides that "whosoever shall maliciously, by any means, manifesting a design to cause grievous bodily harm," etc., attempt to cause grievous bodily harm to any person, the means should be set out with such particularity as necessarily to manifest the design which constitutes the felony, or there should be an allegation following the words of the Act. (d)

It would seem, therefore, that in an indictment, on the 32 & 33 Vic., c. 20, s. 20, for attempting, "by any means calculated to choke," etc., to render any person insensible, with intent, etc., should set forth the means, for they are material as to the offence. But it would, no doubt, be sufficient to follow the forms in the sched. to the 32 & 33 Vic., c. 29, in any case to which they are applicable.

It is not necessary that the proof should, in all cases, tally with the mode of death laid in the indictment. Where an indictment charged the prisoner with felo-

(a) See *Mulcahy v. Reg.* L. R. 3 E. & I. App. 322, per *Willes*, J.

(b) See *Reg. v. Shea*, 3 Allen, 130-1, per *Carter*, C. J.

(c) See *Reg. v. Magee*, 2 Allen, 16 per *Carter*, C. J. ; Arch. Cr. Pldg. 60-3.

(d) *Reg. v. Magee*, *supra*.



niously striking the deceased on the head with a handspike, giving him thereby a mortal wound and fracture, of which he died: it was proved that the death was caused by the blow on the head with the handspike, but that there was no external wound or fracture, the immediate cause of death being concussion of the brain, produced by the blow:—*Held*, that it is sufficient if the mode of death is substantially proved as laid, and it is not necessary that all the intermediate steps between the primary cause and the ultimate result should be also alleged and proved. (a)

The venue of legal proceedings is intended to shew where the principal facts and circumstances in the proceedings occurred, or were alleged to have occurred, with a view to shew that the Court and jury have jurisdiction in the matter. It was formerly necessary to state in the indictment the venue expressly, or, by reference to the venue in the margin, to every material allegation. (b)

But now, by the 32 & 33 Vic., c. 29, s. 15, it is not necessary to state any venue in the body of any indictment. S. 11, of this Statute, relates to procedure only, and does not authorize any order for the change of the place of trial of a prisoner, in any case where such change would not have been granted under the former practice. The Statute does away with the old practice of removing the case, by *certiorari*, into the Queen's Bench, and then moving to change the venue. (c)

Under s. 9, of this Statute, the offence may be alleged to have been committed in *any* District, County, or place through *any part* whereof the coach, waggon, cart, carriage, or vessel, boat or raft passed, in the course of the journey or voyage during which the offence was commit-

(a) *Reg. v. Shea*, 3 Allen, 129.

(b) *Reg. v. Atkinson*, 17 U. C. C. P. 299-300, per *J. Wilson*, J.

(c) *Reg. v. McLeod*, 6 C. L. J. N. S. 64; 5 U. C. P. R. 181.

ted, and the indictment need not state the place where the offence was actually committed. (a)

Where an indictment stated an assault committed upon one Marsh, at Frederickton, in the County of York, but the assault was proved to have been committed on board a steamboat, on the River St. John, in the course of its passage from St. John to Frederickton, before the steamboat arrived within the County of York, and while it was passing through another County:—*Held*, that the indictment was sufficient, and that it was unnecessary to allege the facts as they actually occurred. (b)

It would seem that no objection to the caption of an indictment, for an allegation that the Grand Jurors were “sworn and affirmed,” can be sustained without shewing that those who were sworn were persons who ought to have affirmed, or that those who affirmed were persons who ought to have sworn. (c)

Where an indictment for felony lays a previous conviction, notwithstanding that, when the prisoner is given in charge to the jury, the subsequent felony must be read alone to them, in the first instance, it is no objection to the indictment that the previous conviction is laid at the commencement. (d)

Where a prosecutor has been bound, by recognizance, to prosecute, and give evidence, against a person charged with perjury, in the evidence given by him on the trial of a certain suit, and the Grand Jury have found an indictment against the defendant, the Court will not quash the indictment because there is a variance in the specific charge of perjury contained in the information, and that contained in the indictment, provided the indictment sets

(a) See *Reg. v. Webster*, 1 Allen, 589.

(b) *Ib.*

(c) *Mulcahy v. Reg.* L. R. 3 E. & I. App. 306.

(d) *Reg. v. Hilton*, 5 U. C. L. J. 70; Bell, 20; 28 L. J. (M. C.) 28.

forth the substantial charge contained in the information, so that the defendant has reasonable notice of what he has to answer. (a)

An application to quash an indictment should be made *in limine* by demurrer or motion, or the defendant should wait the close of the evidence for the prosecution to demand an acquittal. (b)

Applications to quash an indictment are considered applications to the discretion of the Court. (c)

A defective indictment may be quashed on motion as well as on demurrer. (d)

It is unusual to quash an indictment, on the application of a defendant, when it is for a serious offence, unless upon the clearest and plainest grounds; but the Court will drive the party to a demurrer, or motion in arrest of judgment, or writ of error. It is, therefore, a general rule that no indictments which charge the higher offences, as treason or felony, will be thus summarily set aside. (e)

The omission of the residences and occupations of Grand Jurors, in the list, and in the panel, was held sufficient ground for quashing an indictment for felony. (f)

Where an indictment charges no offence against law, the objection may be properly taken in arrest of judgment, or the indictment may be demurred to, or a writ of error will lie. (g)

No mere formal defect, in an indictment, can be objected to after the prisoner is found guilty and sentenced at the Court of *Oyer and Terminer*. (h)

An objection to an indictment, as insufficient in law,

(a) *Reg. v. Broad*, 14 U. C. O. P. 168.

(b) *Reg. v. Roy*, 11 L. C. J. 90, per *Drummond*, J. See 32 & 33 Vic. c. 29, s. 32.

(c) *Reg. v. Belyea*, 1 James, 227, per *Dodd*, J.; *Rex v. Hunt*, 4 B & Ad. 430.

(d) *Reg. v. Bathgate*, 13 L. C. J. 299.

(e) *Reg. v. Belyea*, *supra*, 225 per *Dodd*, J.

(f) *Ib.* 220.

(g) *Reg. v. Clement*, 26 U. C. Q. B. 300, per *Draper*, C. J.

(h) *Horseman v. Reg.* 16 U. C. Q. B. 544, per *Robinson*, C. J.

made after the swearing of the jury, and after the prisoner was given in charge to them, was held not too late; for otherwise there never could be a motion in arrest of judgment. (a) *Semble*, an objection may be made at any time for a substantial, but not for a formal, defect, and that the 32 & 33 Vic., c. 29, s. 32, only applies to the latter. (b)

The forms of indictment in the 32 & 33 Vic., c. 29, schedule A., are intended as guides, to simplify forms of indictments. They cannot apply to cases to which they are not applicable, so as to misinform a person of the nature of the offence with which he stands charged. (c) The use of the forms is discretionary with the person framing the indictment. (d)

The forms of indictment in the schedule L, title XL, of the (N. B.) Rev. Stats., were inapplicable to offences not referred to in that title. (e)

It has been held that, before pleading to an indictment, the defendant must submit to the jurisdiction of the Court. (f)

The prisoner must plead in abatement before he pleads in bar. (g)

No more than one plea can be pleaded to any indictment for misdemeanor or criminal information. (h)

(a) *Reg. v. Ryland*, L. R. 1 C. C. R. 99; 37 L. J. (M. C.) 10.

(b) *Ib.*

(c) *Reg. v. Cummings*, 4 U. C. L. J. 188-9, per *Spragge*, V. C.

(d) *Ib.*

(e) *Reg. v. M'Laughlin*, 3 Allen, 159.

(f) *Reg. v. Maxwell*, 10 L. C. R. 45.

(g) *Whelan v. Reg.* 28 U. C. Q. B. 47.

(h) *Reg. v. Charlesworth*, 1 B. & S. 460; 31 L. J. (M. C.) 26.

## CHAPTER X.

## PRACTICE.

JUSTICES of the Peace were appointed in the reign of Edward the first, and their appointment has been continued until the present time. (a)

Under the Con. Stats. Can. c. 100, s. 3, the oath of qualification, by a Justice of the Peace must have been taken before some Justice of the Peace of the County for which he intended to act. It could not be administered by the Clerk of the Peace for such County, under the writ of *Dedimus Potestatem* issued with the Commission of the Peace. (b)

The 29 Vic., c. 12, recites that certain Justices had, theretofore, in error taken and subscribed the oath of qualification before a Clerk of the Peace of the District or County, or before a Commissioner assigned, by *Dedimus Potestatem*, to administer oaths and declarations, and it confirms such oaths so taken and indemnifies the Justice from all penalties, and forfeitures in respect thereof. The Act also prescribes before whom oaths shall, hereafter, be taken.

A certificate purporting to be under the hand and seal of the Clerk of the Peace, that there was no declaration of the Justice's qualification filed in his office, is not sufficient proof that the Justice is not properly qualified. (c) The Justice, in this case, signed a recognizance in the

(a) *Reg. v. Atkinson*, 17 U. C. C. P. 300, per J. Wilson, J.

(b) *Herbert, q. t. v. Dowsell*, 24 U. C. Q. B. 427.

(c) *Reg. v. White*, 21 U. C. C. P. 354.

name of "N. Dickey, J. P." and the certificate shewed that no oath of qualification was filed by "Nathaniel Dickey." It seems this would not be sufficient, and that the identity of the Justice acting, with the one whose qualification was filed, should have been proved. (a)

Under 29 & 30 Vic., c. 51, s. 357, a Police Magistrate for a city, is *ex officio*, a Justice of the Peace for the County, in which such city lies, and by s. 360, a Justice of the Peace for a county in which a city is, may try and investigate any case in a city, where the offence has been committed in the county, or union of counties, in which such city is, or which such city adjoins. (b) Under s. 357 as amended by s. 38, of the (Ont.) 31 Vic., c. 30, an alderman is not *ex officio* legally authorized to act as a Justice of the Peace, until he has taken the oath of qualification as such. (c)

The plain import of ss. 356, 360, 367 and 373, is to establish certain local Courts, having limited criminal jurisdiction, and to define the respective jurisdictions of the Police Magistrate of a city situate within a County, and of the Justices of the Peace of that County, in respect of offences committed within the city, and County respectively. (d)

Under the Commission of the Peace, Justices have a general power for conservation of the peace, and the apprehension and commitment of felons. The Commission gives them jurisdiction in all indictable offences, to discharge, admit to bail, or commit for trial. (e)

The maxim, *omnia præsumuntur rite esse actu*, does not apply to give jurisdiction to Justices, or other inferior

(a) *Reg. v. White*, 21 U. C. C. P. 354.

(b) *Reg. v. Mosier*, 4 U. C. P. R. 64.

(c) *Reg. v. Boyle*, 4 U. C. P. R. 256.

(d) *Reg. v. Morton*, 19 U. C. C. P. 27, per Gwynne, J.

(e) *Connors v. Darling*, 23 U. C. Q. B. 543, per Gowan, J.

tribunals. (a) On this principle, in a prosecution for a penalty, under a by-law of a corporation, the by-law must be proved; for it must appear on the face of the proceedings that there is jurisdiction. (b)

A Justice's jurisdiction depends, not on jurisdiction over the subject matter, but, over the individual arrested, and to give him that jurisdiction, there should be an information properly laid. (c)

Where a limited authority is given to Justices of the Peace, they cannot extend their jurisdiction to cases, not within it, by finding as a fact that which is not a fact, and their warrant in such a case will be no protection to the officer who acts under it. (d)

Where a Statute gives to Justices a discretion, whether they will do a particular thing, it does not enable them, having heard the case, to refuse a warrant, because they think the law under which they are called upon to act is unjust. (e)

Where the charge laid as stated in the information, does not amount in law to the offence, over which the Justice has jurisdiction, his finding the party guilty by his conviction, in the very words of the Statute will not give him jurisdiction. The conviction would be bad on its face, all the proceedings being before the Court. (f)

In a prosecution before Justices, their jurisdiction is ousted by the accused setting up a claim of right, yet that claim must be *bona fide*, and the mere belief of the accused unsupported by any ground for the claim, will be insufficient. (g)

(a) *Reg. v. Atkinson*, 17 U. C. C. P. 302.

(b) *Reg. v. Wortman*, 4 Allen, 73; *Rex v. All Saints, Southampton*, 7 B. & C. 785.

(c) *Caudle v. Ferguson*, 1 Q. B. 889; *Friel v. Ferguson*, 15 U. C. C. P. 594, per A. Wilson, J.

(d) *The Haidee*, 10 L. C. R. 101; *The Scotia S. V. A. R.* 160.

(e) *Reg. v. Boteler*, 4 B. & S. 959; 33 L. J. (M. C.) 101.

(f) *Re McKinnon*, 2 U. C. L. J. N. S. 327, per A. Wilson, J.

(g) *Reg. v. Cridland*, 7 E. & B. 853; 27 L. J. (M. C.) 28; *Reg. v. Stimpson*, 4 B. & S. 307; 32 L. J. (M. C.) 208.

The jurisdiction is not ousted by the accused setting up a claim of right, which cannot by law exist. (a)

On the hearing of a complaint for assault, under the 32 & 33 Vic., c. 20, s. 43, if it be shewn that a *bona fide* question as to the title to land is involved, the jurisdiction of the Justices is at once ousted, by s. 46, and the Justices cannot proceed to enquire into, and determine by summary conviction, any excess of force alleged to have been used in the assertion of title. (b) The matter may still be disposed of by indictment, if it be a proper case for such a proceeding. (c)

A complaint under s. 43 cannot be withdrawn by the complainant, even with the consent of the Justice. (d) The reason why the complainant is prevented from withdrawing the charge before the Magistrate is, that he has made it a public matter, and that the person charged has the right to have it tried, and because, also, the complainant has made his election to have the case so disposed of, from which he cannot withdraw. (e)

If Justices hear the case but decline to conclude it, as they should have done, they will be ordered to hear it. (f) So if they refuse to hear the whole case, and dismiss the summons. (g) But if Justices, in their own discretion, refuse to hear a complaint which is the subject of an indictment, the Court will not compel them to go on. (h)

The fact that the defendant pleads guilty to the charge cannot deprive the Justice of the discretion he has to adjudicate on the case, under s. 46.

(a) *Hudson v. McRae*, 4 B. & S. 585; 33 L. J. (M. C.) 65.  
 (b) *Reg. v. Pearson*, L. R. 5 Q. B. 237.  
 (c) *Ib.* 239, per *Lush*, J.  
 (d) *Re Conklin*, 31 U. C. Q. B. 160.  
 (e) *Ib.* 168, per *Wilson*, J. See also *Tunncliffe v. Tedd*, 5 C. B. 553; *Vaughton and Bradshaw*, 9 C. B. N. S. 103.  
 (f) *Rex v. Tod*, Str. 531.  
 (g) *Rex v. Justices Cumberland*, 4 A. & E. 695.  
 (h) *Reg. v. Higham*, 14 Q. B. 396; *Re Conklin*, *supra*, 167, per *Wilson*, J.



The adjudication means the Justice's final judgment or sentence to be pronounced. (a) If the Justice adjudicate, the defendant will be entitled to the certificate, under s. 44, and if he do not adjudicate, there will be no certificate, and so there will be no bar to any subsequent proceedings. (b) There is no right to a certificate unless there has been a hearing upon the merits. (c)

A certificate under s. 44, given by a Justice on a charge of assault and battery, is a defence to an indictment, founded on the same facts, charging an assault and battery, accompanied by malicious cutting and wounding, so as to cause grievous or actual bodily harm. (d) So, a former conviction by a Justice is a bar to an indictment for felonious stabbing. (e) The certificate is also a bar to an indictment for assault, with intent to commit rape. (f)

One C. appeared to an information charging him with an assault, and praying that the case might be disposed of summarily, under the Statute. The complainant applied to amend the information by adding the words "falsely imprison." This being refused, the complainant offered no evidence, and a second information was at once laid, including the charge of false imprisonment. The Magistrate refused to give a certificate of dismissal of the first charge, or to proceed further thereon, but endorsed on the information "Case withdrawn by permission of Court, with the view of having a new information laid":—*Held*, that the information might be amended, but, as the original was under oath, that it must be re-sworn. *Semble*, under the circumstances, the more correct course would have been to go on with the original case, and, under s. 46, to refrain from adjudicating. (g)

(a) *Re Conklin*, 31 U. C. Q. B. 166, per *Wilson*, J.

(b) *Ib.* 166, per *Wilson*, J.; *Hartley v. Hindmarsh*, L. R. 1 C. P. 553.

(c) *Re Conklin*, 31 U. C. Q. B. 168, per *Wilson*, J.

(d) *Ib.* 165, per *Wilson*, J.; *Reg. v. Ebrington*, 1 B. & S. 688.

(e) *Reg. v. Walker*, 2 M. & Rob. 446; *Re Conklin*, *supra*, 165, per *Wilson*, J.

(f) *Ib.*; *Re Thompson*, 6 H. & N. 193; 6 Jur. N. S. 1247.

(g) *Re Conklin*, *supra*, 160.

Justices of the Peace have no jurisdiction to convict summarily, at common law, in any case, but, in all cases, a direct legislative authority must be shewn, or the conviction will be illegal. (a)

At common law, Justices had no summary jurisdiction to try complaints for assaults. That jurisdiction was derived solely from the 4 & 5 Vic., c. 27, s. 27. It seems that, under the 32 & 33 Vic., c. 20, s. 48, the prayer for summary jurisdiction should appear on the face of the conviction. (b)

The 32 & 33 Vic., c. 31, as amended by the 33 Vic., c. 27, confers power on Justices to convict summarily, in certain cases, and prescribes the duties of Justices of the Peace out of sessions, in relation to summary convictions and orders. Under s. 5., of this Statute, a variance between the information, complaint, or summons, and the evidence adduced on the part of the informant, or complainant, is not fatal if the defendant has not been deceived or misled thereby, or has no defence on the merits. (c)

The object of the Legislature, in this provision, seems to have been to prevent the failure of justice in cases where, by the old law, very great technical precision was required, and that before a tribunal where great legal accuracy could hardly be expected. (d) It may be doubtful, under the terms of the section, whether the question of the party having been misled is not merely for the discretion of the Justices, as to the adjourning the hearing to a future day. (e)

On an information for selling spirituous liquors without a license, contrary to the by-laws of the Town of

(a) *Bross v. Huber*, 18 U. C. Q. B. 286, per *Robinson*, C. J.

(b) *Re Switzer*, 9 U. C. L. J. 286.

(c) See *Ex parte Dunlap*, 3 Allen, 281. See also s. 21 and 22.

(d) *Ib.* 283-4, per *Carter*, C. J.

(e) *Ib.* 284, per *Carter*, C. J.

Moncton, the illegal sale was proved, but there was no evidence of the by-laws, and the Justices convicted the defendant of selling, contrary to the Statute to regulate the sale of spirituous liquors, 17 Vic., c. 15, :—*Held*, that, as it did not appear that the defendant was misled, or had any defence on the merits, the variance between the information and the conviction was not fatal, since the (N. B.) Rev. Stat., c. 138, s. 1, which is, in substance, the same as s. 5 of the present Act. (a)

But it would seem that this section must be held to apply only to informations made by persons who have authority to make them, and not to give vitality to an information made by a person without any authority, and, in fact, to give the Justice jurisdiction over the matter when otherwise he would not have it. (b)

A Justice has no authority, either under the 32 & 33 Vic., c. 30 or c. 31, to issue a summons or warrant for the arrest of a party without an information properly laid. The laying of the information is necessary to give the Justice jurisdiction, even where a crime is committed over which he might have jurisdiction. (c)

It is the duty of a Justice to have an information laid, and, when properly laid, he has power over a person, to bring him up to answer a charge. (d)

An information, by a person who has no authority to make it, is the same as no information, and does not authorize the issue of a summons or warrant. (e)

An information, to be tried before two Justices, is good, though only signed by one. (f)

(a) *Ex parte Dunlap*, 3 Allen, 281.

(b) *Ex parte Eagles*, 2 Hannay, 54, per Ritchie, C. J.

(c) See *Appleton v. Lepper*, 20 U. C. C. P. 142, per Hagarty, J.; *Powell v. Williamson*, 1 U. C. Q. B. 154; *Friel v. Ferguson*, 15 U. C. C. P. 584; *ex parte Eagles*, 2 Hannay, 53-4, per Ritchie, C. J.

(d) *Connors v. Darling*, 23 U. C. Q. B. 546, *et seq.*, per Hagarty, J.

(e) *Ex parte Eagles*, *supra*, 54, per Ritchie, C. J.

(f) *Falconbridge q. t. v. Tourangeau*, Rob. Dig. 260.

Unless a Statute require that the information should be in writing, or on oath, it need not be so. (a)

Where power is given, by an Act, to a Justice to issue a summons upon complaint made on oath, and the party to be summoned appears and defends the suit, without any summons being issued, he cannot afterwards object that there was no complaint on oath, that being only a preliminary step to authorize the summons to issue. (b)

A complaint charging a "clandestine removal of property" does not justify or require the issuing of a warrant, as for a criminal offence, and the utmost that it does justify is the issuing of a summons under the Act relating to petty trespasses. (c)

If a Statute gives summary proceedings for various offences, specified in several sections, an information is bad which leaves it uncertain under which section it took place. (d)

Where a Statute creates several offences, one of which is charged in an information, a conviction of another offence, the subject of the same penalty, will be bad. In a prosecution under the Con. Stats. L. C., c. 6, the conviction must exactly conform to the charge in the information. (e)

In a complaint for breach of a by-law, it is not necessary to insert the by-law itself, or to make a distinct allegation that it is in force.

A complaint may be made and a summons issued for two offences, provided the defendant has not been arrested in the first instance, and a conviction for one of such offences specifying it is valid. Service of a copy of a sum-

(a) *Friel v. Ferguson*, 15 U. C. C. P. 594; *Re Conklin*, 31 U. C. Q. B. 168, per *A. Wilson, J.*; see s. 24.

(b) *Ex parte Wood*, 1 Allen, 422. This case was on a local act, 6 Wm. 4, c. 44, as to recovery of seamen's wages.

(c) *McNellis v. Gartshore*, 2 U. C. C. P. 471, per *McLean, J.*

(d) *Thompson and Durnford*, 12 L. C. J. 287, per *Mackay, J.*

(e) *Ib.* 285.

mons, issued by a Magistrate, followed by appearance of the defendant, is sufficient. (a)

Where two or more persons may commit an offence under an Act, the information may be jointly laid against them. (b) But where the penalty is imposed upon each person, it is wrong to convict them jointly, even when they are charged on a joint information. (c)

If either the penalty be imposed, by the Act, on each person convicted, even where the offence would, in its own nature, be single, or if the quality of the offence be such that the guilt of one person may be distinct from that of the other, in either of these cases the penalties are several. (d)

At Petty Sessions, an information was laid against two defendants, charging that they did unlawfully use gun and kill two pheasants, contrary to the 1 & 2 Wm. 4, c. 32, s. 3. Each claimed to be tried separately, in order to call the other as a witness. The Justices refused, and heard the charge against both together, and convicted them, and a conviction was drawn up separately against each defendant imposing a penalty of £3 :—*Held*, that it was in the discretion of the Justices whether they would hear the charge separately or not, that as the penalty was imposed on every person acting in contravention of the Statute, each defendant was separately liable to the whole penalty ; and that, separate convictions were right, although the prisoners were charged on a joint information. (e)

It is conceived that the ground of the decision, in this case, will apply to the Con. Stats. U. C., c. 104, s. 7, and that, where there are several defendants, they may be

(a) *Corignan v. Harbour Comrs. Montreal*, 5 L. C. R. 479.

(b) *Reg. v. Littlechild*, L. R. 6 Q. B. 295, per *Lush*, J.

(c) *Ib.* 295, per *Mellor*, J.

(d) *Ib.* 296, per *Hannen*, J.

(e) *Reg. v. Littlechild*, *supra*.

tried together and separate penalties imposed on each, for s. 7 imposes a separate penalty on any person.

A conviction purporting to be made under Con. Stats. Can. c. 93, s. 28, charged that defendant, at a time and place named, wilfully and maliciously, *took* and *carried away* the window sashes out of a building, owned by one C., against the form of the Statute, etc., without alleging damage, injury or spoil to any property, real or personal, or finding damage to any amount:—*Held*, that the conviction should clearly shew whether the damage, injury or spoil complained of, is done to real, or personal property, stating what property, and in consequence of s. 29, where a private person is prosecutor, should also shew the amount, which the Justice has ascertained to be reasonable compensation for such damage injury or spoil. (a)

The offence, created by the Statute, is damaging property, not taking and carrying it away. (b)

It is sufficient, if a conviction follows the forms set out in the Statutes, for the forms are intended as guides to Justices, and, otherwise, they would prove only snares to entrap persons. (c)

A conviction following the form, (L.) (N.B.) 1 Rev. Stat. 391, is sufficient. It would be no objection, however, if the conviction stated the name of the informer, or party, laying the information. (d)

Where a form of conviction was not sanctioned by any express Statute, a Justice was bound to follow such form, as would be sufficient under 2 Wm. 4, c. 4., which supplied a form to be used in all cases of summary conviction, except where a form is specially given for the particular case. (e)

(a) *Reg. v. Caswell*, 20 U. C. C. P. 275.

(b) *Ib.*

(c) *Reg. v. Shaw*, 23 U. C. Q. B. 618, per *Draper*, C. J.; *Reid v. McWhinnie*, 27 U. C. Q. B. 289; *Reg. v. Hyde*, 16 Jur. 337; *Re Allison*, 10 Ex. 561.

(d) *Ex parte Eagles*, 2 Hannay, 53, per *Ritchie*, C. J.; *Reg. v. Johnson*, 8 Q. B. 102.

(e) *Moore v. Jarron*, 9 U. C. Q. B. 233. See 32 & 33 Vic., c. 31, s. 50.

The name of the informant or complainant must in some form or other appear on the face of the conviction. (a) The place, for which the Justice acts, must be shewn, and it must be alleged that the offence was committed within the limits of his jurisdiction, or facts must be stated, which give jurisdiction beyond those limits. (b)

The offence, of which the defendant is convicted, must be stated with certainty, otherwise the conviction will be quashed. A conviction "for wilfully damaging, spoiling, and taking, and carrying away six bushels of apples of the said Rogers, whereby the defendant committed an injury to the said goods and chattels" was held not to contain a statement of an offence, for which a conviction could take place. (c)

Where an information, in a conviction, charged the defendant with measuring or surveying lumber, intended for exportation in violation of the Act of Assembly, 8 Vic., c. 81, and the evidence referred to three distinct acts, but it did not appear for which of them the defendant had been convicted:—*Held*, that the conviction was bad for uncertainty. (d)

A conviction adjudging the defendant to be imprisoned for twenty-five days, or payment of £5 and costs, in the *alternative*, is bad. (e)

A conviction, by two Justices for taking lumber feloniously or unlawfully, is bad, for it should not have been in the alternative. If the conviction was unlawful only, not felonious, it should have shewn how it was unlawful, and it should have shewn, also, that the offence came under our statute, which gave the Justices power to convict. (f)

(a) *Re Hennesy*, 8 U. C. L. J. 299.

(b) *Reg. v. Shaw*, 23 U. C. Q. B. 618, per *Draper*, C. J.; *Rex v. Edwards*, 1 E. 278.

(c) *Eastman v. Reid*, 6 U. C. Q. B. 611.

(d) *Reg. v. Stevens*, 3 Kerr, 356.

(e) *Reg. v. Wortman*, 4 Allen, 73.

(f) *Reg. v. Craig*, 21 U. C. Q. B. 552.

The petitioner was convicted, by a Court Martial held at the city of Montreal, on the 26th, 27th, 28th and 29th days of March, 1867, and on the 1st and 2nd days of April, 1867, on the following charge " for disgraceful conduct, in having at Montreal, Canada East, some time between the 17th January and 16th March, 1867, fraudulently embezzled or misapplied, about five hundred cords of wood, government property intrusted to his charge as an Assistant-Commissariat-Storekeeper, and which, at the latter date, was found deficient," and, thereupon, on the said conviction, the Court, forthwith, sentenced the petitioner, among other penalties, to be imprisoned, with hard labour, for six hundred and seventy-two days. The Court held that it did not appear there had been preferred against the petitioner, any specific charge, nor any conviction of him upon a specific, or positive charge, but a conviction in the alternative, one of the two being no offence created by the 17th article of the Mutiny Act, without any certainty, as to either of the two charges in the disjunctive, and that this was a matter of substance, and therefore, the warrant of commitment was null and void, and the petitioner, who had been committed to prison, was entitled to be set at liberty. (a)

In describing the offence in convictions, it is not sufficient to state, as the offence, that which is only the legal result of certain facts, but the facts themselves must be specified, so that the Court may judge whether they amount in law to the offence.

A conviction, by a Magistrate, stated that defendant did, on etc., at etc., being a public highway, use blasphemous language contrary to a certain by-law passed almost in the words of the Con. Stats. U. C. c. 54, s. 282 ss. 4, but there was no statement of the particular lan-

(a) *Re Moore*, 11 L. C. J. 94.



guage used, it was held bad as the statement in the conviction was only the legal result of certain facts, and the facts themselves were not set out. (a) The particular words used should have been stated.

As a general rule, where an Act in describing the offence makes use of general terms, which embrace a variety of circumstances, it is not enough to follow, in a conviction, the words of the Statute ; but it is necessary to state what particular fact prohibited has been committed. But, in framing a conviction, it is, in general, sufficient to follow the words of the Statute, where it gives a particular description of the offence. Where a particular Act creates the crime, it may be enough to describe it in the words of the Legislature, but where the Legislature speaks, in general terms, the conviction must state what act in particular was done, by the party offending, to enable him to meet the charge. (b)

The legal effect of reversing or annulling a conviction is to render the sentence and imprisonment illegal, and not as for a crime. The rule has been laid down, that when judgment, pronounced upon a conviction, is falsified or reversed, all former proceedings are absolutely set aside, and the party stands as if he had never been at all accused ; restored in his credit, his capacity, his blood and his estates, with regard to which last, though they be granted away by the crown, yet the owner may enter upon the grantee, with as little ceremony as he might enter upon a disseizor. (c)

Where a conviction, which had been affirmed on appeal to the Sessions, was brought up by *certiorari*, contrary to the 32 & 33 Vic., c. 30, s. 71, as amended by the

(a) *Re Donnelly*, 20 U. C. C. P. 165.

(b) *Re Donnelly*, 20 U. C. C. P. 167, per *Hagarty*, C. J.; and see *Rex v. Sparling*, 1 Str. 497 ; *Reg. v. Scott*, 4 B. & S. 368 ; *Reg. v. Nott*, 4 Q. B. 768, as to particular applications of these principles.

(c) *Davis v. Stewart*, 29 U. C. Q. B. 446, per *Wilson*, J. ; 4 Bla. Com. 393.

33 Vic., c. 27, s. 2, which enacts that in such case no *certiorari* shall issue :—*Held* that, although the conviction was clearly bad, the Court could not quash it, for the case was one in which the Justice had jurisdiction, and the Court were not asked to do anything to enforce the conviction, and no motion had been made to quash the *certiorari*. (a)

It would seem that a conviction by a Justice may be quashed, unless it is sealed. (b)

A conviction will be quashed, if it appears that the offence was for a felony, and that the defendant was not put on his defence, or allowed to cross-examine the witnesses. (c)

A conviction will be quashed, if the summons states no place where the offence was committed, although the place appear on the face of the conviction. (d)

But under the 14 & 15 Vic., c. 95, a conviction by a Justice, awarding imprisonment, and also for damages and costs, will be sustained. (e)

The Court will not give costs against a public officer, on quashing a conviction. (f)

It seems the Court have no power to allow costs in quashing a conviction. (g)

Where Justices have power to award costs, on a summary conviction, they must specify the amount. (h)

The Justices' Summary Convictions Act (N.B.) 12 Vic., c. 31, gave no general power to award costs on convictions; and, on convictions under this Act, they can only

(a) *Reg. v. Johnson*, 30 U. C. Q. B. 423.

(b) *Haacke v. Adamson*, 14 U. C. C. P. 201. See also *M'Donald v. Stuckey*, 31 U. C. Q. B. 577; 32 & 33 Vic. c. 31, s. 42.

(c) *Ex parte Lindsay*, Rob. Dig. 73.

(d) *Ex parte Leonard*, 6 L. C. R. 480.

(e) *Ex parte M'Quin*, Rob. Dig. 75.

(f) *Ex parte De Beaujeu*, 1 L. C. J. 15.

(g) *Reg. v. Stevens*, 3 Kerr, 356.

(h) *Ex parte Hartt*, 3 Allen, 122.

be awarded when given by the Statute creating the offence. (a)

A conviction is bad, which orders imprisonment in default of immediate payment of a sum of money, when the by-law, upon which it is based, is in the alternative, imposing a fine *or* imprisonment. A conviction is also bad which gives costs, when the by-law upon which it is based gives no jurisdiction as to costs. (b)

A judgment for too little is as bad as a judgment for too much; and a conviction for one month instead of two months is, therefore, bad. (c)

An information or complaint may be amended; but if on oath, it must be re-sworn. (d)

A conviction, inflicting one penalty for two offences, is bad. (e)

Where the defendant is summarily convicted, at one time, of several offences, the Justice has power, under 32 & 33 Vic., c. 31, s. 63, to award that the imprisonment, under one or more of the convictions, shall commence at the expiration of the sentence previously pronounced. (f)

Under the 7 & 8 Geo. 4, c. 28, the practice of the Judges was, where more than one case of felony was established against a man, and he was convicted of them at one and the same time, to make the sentence of imprisonment for the two or three offences, as the case might be, commence at the expiration of the sentence first awarded. (g)

Judgment may be rendered by two Justices of the Peace, in a case heard by three, when, by the Statute,

(a) *Ex parte Clifford*, 3 Allen, 16.

(b) *Ex parte Marry*, 14 L. C. J. 163.

(c) *Ex parte Slack*, 7 L. C. J. 6.

(d) *Re Conklin*, 31, U. C. Q. B. 160.

(e) *Corignan v. Harbour Comrs. Montreal*, 5 L. C. R. 479.

(f) *Reg. v. Cutbush*, L. R. 2 Q. B. 379.

(g) *Ib.* 382, per Cockburn, C. J.

one Justice might have heard and determined the case. (a)

It seems that, where a Statute directs Justices of a division to do a certain act, any Justice of the county may do it. So, also, where Justices in or near a place are empowered (b)

Where a Statute empowers two Justices of the Peace to convict, a conviction by one only is not sufficient. (c)

The 32 & 33 Vic., c. 30, defines the duties of Justices of the Peace, out of Session, in relation to persons charged with indictable offences.

When a person accused of felony, committed in Canada, is brought up before a Justice for examination, and discharged by the Justice, such discharge does not operate as a bar to the same person being again brought up before another Justice, and committed upon the same charge, upon the same or different evidence. (d)

On charges of indictable offences, the Justice must proceed in the manner pointed out by the 32 & 33 Vic., c. 30, s. 29, *et seq.*: witnesses must be examined against the defendant, as prescribed by the Statute; for even if a party is examined before the Magistrate, yet if the prosecutor does not appear, and no witnesses are examined, the commitment will be illegal. The plaintiff was arrested upon a warrant issued by the defendant, a Magistrate, and brought before him. Defendant examined the plaintiff, but took no evidence, said he could not bail, and committed the plaintiff to gaol, on a warrant reciting that he was charged before him, on the oath of W. H., with stealing. The plaintiff did not ask to have any hearing or investigation, or produce, or offer

(a) *Ex parte Trowley*, 9 L. C. J. 169. See *Ex parte Brodeur*, 2 L. C. J. 97.

(b) *Reg. v. Wheten*, 3 Allen, 269.

(c) *Re Crow*, 1 U. C. L. J. N. S. 302; 1 L. C. G. 189.

(d) *Reg. v. Morton*, 19 U. C. C. P. 26, per Gwynne, J.

to procure, any evidence on his behalf, or to give bail to the charge:—*Held*, that the commitment, without appearance of the prosecutor, or examination of any witnesses, or of the plaintiff, according to the Statute, or any legal confession, was an act wholly without, or in excess of, the jurisdiction of the Magistrate, and illegal. (a)

Where a Justice commences the examination of a party on a criminal charge, and after hearing a portion of the evidence, refuses to proceed further, the prosecutor may, nevertheless, prefer an indictment against the prisoner before a Grand Jury. (b)

Where a warrant was directed to the constable of Thorold, in the Niagara District, authorizing him to search the plaintiff's house, at the Township of Louth, in the same district, it not appearing that there was more than one person appointed to the office of constable of Thorold:—*Held*, that the direction to *the Constable of Thorold*, not naming him, to execute the warrant in the Township of Louth, was good; for, although a warrant to a peace officer, by his name of office, gives him no authority out of the precincts of his jurisdiction, yet such authority may be expressly given on the face of the warrant, as in this case. (c)

A warrant, though irregular, is a justification to the officer who executes it, because they are not to canvass the legality of the process they execute, or set up their private opinion against that of the Justice as to the goodness of the warrant. (d)

The warrant of a Justice is only *prima facie* not conclusive evidence of its contents; as, for instance, a recital

(a) *Connors v. Darling*, 23 U. C. Q. B. 541.

(b) *Reg. v. Duvaney*, 1 Hannay, 571.

(c) *Jones v. Ross*, 3 U. C. Q. B. 328.

(d) *Ovens v. Taylor*, 19 U. C. C. P. 56, per *Hagarty, J.*; *Painter v. Liverpool Gas Co.* 3 A. & E. 433.

in the warrant that an information was laid prior to its issue is only *prima facie* evidence of that fact. (a)

Justices of the Peace, acting judicially in a proceeding in which they have power to fine and imprison, are Judges of record, and have power to commit to prison orally, without warrant, for contempt, committed in the face of the Court. (b)

Thus, if the Justice be called a "rascal, and a dirty mean dog," "a damned lousy scoundrel," a "confounded dog," etc., the Justice has a right to imprison as often as the offence is committed.

A prisoner was convicted three several times on the same day for using the above opprobrious epithets to a Justice, while in the execution of his office, and detained in prison under three several warrants, all dated the same day, the periods of imprisonment in the two last commencing from the expiration of the one preceding it, but the first to be computed "from the time of his arrival and delivery (by the bailiff) into your (the gaoler's) custody thenceforward" :—*Held*, that the Justice had a right to convict and sentence for continuing periods, and to make the period of imprisonment on the second and third adjudications begin at the termination of the first imprisonment; but, as the first period of imprisonment was depending on the will of the officer who was to convey to gaol, it was, therefore, uncertain, and the other periods of imprisonment depending on the same contingency, were likewise uncertain, and the prisoner was, therefore, entitled to his discharge. (c)

A Justice of the Peace, while sitting in discharge of his duty examining parties upon a criminal charge, has power to protect himself from insult, and to repress dis-

(a) *Friel v. Ferguson*, 15 U. C. C. P. 584.

(b) *Armstrong v. M'Caffrey*, 1 Hannay, 517.

(c) *Reg. v. Scott*, 2 U. C. L. J. N. S. 323.

order, by committing for contempt any person who shall violently or indirectly interrupt his proceedings, or conduct himself insultingly towards the Justice. Where any person present behaves himself in such a manner as to obstruct the Justice's proceeding, he may, upon view of the improper behaviour, and without any formal proceeding, order him at once into custody, and direct him to be withdrawn, so as to remove at once the obstruction to the administration of justice, or may commit him till he finds sureties to keep the peace. But he has no power, either at the time of the misconduct, much less on the next day, to make out a warrant to a constable, and to commit the offending party to gaol for any certain time, by way of punishment, without adjudging him formally, after a summons, to appear for hearing to such punishment on account of his contempt, and a hearing of his defence, and making a minute of such sentence. (a)

It has been doubted whether a Justice of the Peace, executing his duty in his own house, and not presiding in any Court, can legally punish for a contempt committed there. (b)

A commitment by a Justice for a contempt, if there be no recorded conviction, should shew that the party was convicted of the contempt, and stating that he is charged with it is insufficient. At any rate, the evidence should in some way shew the fact of conviction, and the manner of it. (c)

A warrant to a constable to commit for contempt, containing a direction to detain the party till he shall pay the costs of his apprehension and conveyance to gaol, is defective.

The Statute 3 James 1, c. 10, only authorizes such ex-

(a) *Re Clarke*, 7 U. C. Q. B. 223.

(b) *M'Kensie v. Mewburn*, 6 U. C. Q. B. O. S. 486.

(c) *Ib.*

penses to be levied of the offender's goods: and if he could be imprisoned till he paid them, it would be necessary that the amount of such expenses should be stated, or the gaoler would not know when he might discharge him.

Where a power resides in any Court or Judge to commit for contempt, it is the peculiar privilege of such Court or Judge to determine upon the facts, and it does not properly belong to any higher tribunal to examine into the truth of the case. (a)

Therefore, the Court, in adjudicating on a case of contempt, will not enter into the truth of the alleged facts constituting the contempt.

A Justice's warrant of commitment for an indefinite time is bad. A commitment is also bad which directs the prisoner to be kept in custody until the costs are paid, without stating what is the amount of the costs. The reason is, that, in such a case, the gaoler does not know what sum to accept as sufficient for the prisoner's release. (b)

In respect to warrants committing prisoners on charges of offences committed, it has been held not necessary to state, on the face of them, that the Justice had information on oath, which could justify him in binding the defendant to keep the peace. (c)

A warrant of commitment must state the place where the offence was committed, otherwise it will be defective. (d)

It is a general rule, that, where a man is committed for any crime, either at common law, or created by Act of Parliament, for which he is punishable by indictment,

(a) *Re Clarke*, 7 U. C. Q. B. 223.

(b) *Dawson v. Fraser*, 7 U. C. Q. B. 391.

(c) *Ib.*

(d) *Re Beibe*, 3 U. C. P. R. 270.



then he is to be committed until discharged by due course of law. But where the committal is in pursuance of a special authority, the terms of the commitment must be special, and must exactly pursue that authority. (a)

It is not necessary that, in the warrant of commitment, the offence should be described with the nicety and technical precision of an indictment; but the prisoner should be charged with some legally defined and well-known offence, for which he would be subjected to criminal proceedings, either by indictment or otherwise, and that specific offence cannot be included under a general term, which compendiously covers a great variety of criminal offences. (b)

As the term felony includes a number of crimes, ranging between treason and larceny, it is not sufficient simply to designate the offence by the name of the class of offences to which the Justice may find or judge it to belong.

A commitment, in the absence of any statutory provisions prescribing its forms and contents, should state the facts charged to constitute the offence with sufficient particularity to enable the Court or Judge, on *Habeas Corpus*, to determine what particular crime is charged against the prisoner; and if it fail to do this, the prisoner ought to be discharged. (c)

Defects in stating an offence in a warrant of commitment are not fatal, for there is not the same necessity for adherence to technical terms as in an indictment; and upon the return to a *Habeas Corpus*, it is the evidence which is the foundation of the warrant the Court looks at, when the evidence is before them on a *Certiorari*, rather than the warrant itself; and when a legal cause

(a) *Re Anderson*, 11 U. C. C. P. 54.

(b) *Reg. v. Young; The St. Alban's Raid*, 3, per *Badgley*, J.

(c) *Ib.* 3, per *Badgley*, J.

for imprisonment appears on the evidence, the ends of justice are not allowed to be defeated by a want of proper form in the warrant, but the Court will rather see that the error is corrected. (a)

The Court has authority, in virtue of its inherent jurisdiction at common law, when a prisoner charged with felony is brought up on a *Habeas Corpus*, to look not merely at the commitment, but also at the depositions; and though the former be informal, yet, if the latter shew that a felony has been committed, and that there is a reasonable ground of charge against the prisoner, he will be remanded, and not bailed, with a view to amending the warrant, as above mentioned. (b)

It would seem that, where proceedings are taken by *Habeas Corpus* and *Certiorari*, under the 29 & 30 Vic., c. 45, the evidence may also be looked at on the return to the *Certiorari*. (c)

This Statute had in view and recognizes the right of every man, committed on a criminal charge, to have the opinion of a Judge of the Superior Court on the cause of his commitment by an inferior jurisdiction. The Judges of the Superior Court are bound, when a prisoner is brought before them, under the Statute, to examine the proceedings and evidence anterior to the warrant of commitment, and to discharge the prisoner, if there does not appear sufficient cause for his detention. (d)

Before section 3 of this Statute, there was no way of enquiring into the truth of the facts, as stated in the return. Section 3 provides that, in all cases coming within the Act, although the return to any writ of *Habeas Corpus* shall be good, and sufficient in law, it shall be lawful for

(a) *Re Anderson*, 20 U. C. Q. B. 162, per *Robinson*, C. J.; *Rex v. Marks*, 3 Ea. 157.

(b) *Re Anderson*, 11 U. C. C. P. 56.

(c) *Reg. v. Levecque*, 30 U. C. Q. B. 509.

(d) *Reg. v. Mosier*, 4 U. C. P. R. 64.

the Court, or for any Judge before whom such writ may be returnable, to proceed to examine into the truth of the facts set forth in such return, by affidavit or by affirmation, where an affirmation is allowed by law.

As to the writ of *Certiorari*, which is always issued along with the *Habeas Corpus*, in order to bring up the depositions and papers, Chief Justice *Draper*, in *Re Burley*, (a) declared that it could not properly be issued in vacation, returnable before a Judge in Chambers, but that the writ must be returnable before the Court in *Banc*. But now the 29 & 30 Vic., c. 45, s. 5, authorizes a return of the writ "to any Judge in Chambers, or to the Court."

Before this Act, writs of *Certiorari* had, in practice, issued in vacation, by order of a Judge in Chambers, but, as the power to do so was doubted, the Act was passed to remove the doubt. (b)

The prisoner may contradict the return to the writ of *Habeas Corpus*, by shewing that one of the persons who signed the warrant was not a legally qualified Justice of the Peace, and it would seem that he could do so, even independent of the above Statute. (c) But, at all events, this section disposes of the point by empowering the Judge to examine into the truth of the facts set forth in the return. (d)

Justices should not omit any part of a prescribed form of commitment, lest the part omitted be material and render the warrant invalid. (e)

When a Justice follows the words used by the Legislature, the Court will hold that he intended them in the same sense, but, if he uses other words, he ought to be

(a) 1 U. C. L. J. N. S. 43.

(b) *Reg. v. Mosier*, 4 U. C. P. R. 70, per *J. Wilson*, J.

(c) *Bailey's case*, 3 E. & B. 614.

(d) *Reg. v. Boyle*, 4 U. C. P. R. 256.

(e) *Re Beebe*, 3 U. C. P. R. 373, per *Hagarty*, J.

more precise. (a) It is, however, the duty of the Court to take care that, in all cases brought before them, Justices shall have the full protection to which the law entitles them. (b)

A warrant of commitment, under 31 Vic., c. 16, signed by one qualified Justice of the Peace, and by an alderman who has not taken the necessary oath, is invalid to uphold the detention of a prisoner confined under it, though it might be a justification to a person acting in virtue of it, if an action were brought against him. (c)

The 32 & 33 Vic., c. 31, s. 86, provides that, after a case has been heard and determined, one Justice may issue all warrants of distress or commitment thereon.

By s. 87, it shall not be necessary that the Justice who acts before or after the hearing be the Justice, or one of the Justices, by whom the case is or was heard and determined. It is, therefore, not necessary that a warrant of distress or commitment should be signed by two Justices, though two are required to convict; nor is it necessary that the Justice who commits should also have heard and determined. (d)

The issuing of a warrant of commitment, under 32 & 33 Vic., c. 31, s. 75, is discretionary and not compulsory upon a Justice of the Peace. The Court will, therefore, upon this ground, as well as upon the ground that the person sought to be committed has not been made a party to the application, refuse a *Mandamus* to compel the issuing of the warrant. (e)

The Con. Stats. U. C., c. 126. s. 6, was passed expressly for the protection of Justices of the Peace; and when it is desired to compel a Justice to issue a warrant of commit-

(a) *Re Anderson*, 11 U. C. C. P. 63.

(b) *Croukhite v. Sommerville*, 3 U. C. Q. B. 131, per *Robinson*, C. J.

(c) *Reg. v. Boyle*, 4 U. C. P. R. 256.

(d) *Re Crow*, 1 U. C. L. J. N. S. 302.

(e) *Re Delaney v. Macnab*, 21 U. C. C. P. 563.

ment against a person, proceedings should not be taken by *Mandamus*, but a rule should be issued, under this clause, and the person to be affected should be made a party to the rule. (a)

Where the defendant, a Justice of the Peace, issued his warrant, under Con. Stats. Can., c. 103, s. 67, to commit the plaintiff for thirty days, for non-payment of the costs of an appeal to the Quarter Sessions, unless such sum and all costs of the distress and commitment and conveying the party to gaol should be sooner paid, but omitted to state in the warrant the amount of the costs of distress, commitment and conveyance to gaol :—*Held*, that it was the duty of the Justice to ascertain and state the amount of these costs ; yet the omission to do so, though it might have occasioned the plaintiff's discharge, did not shew either a want or excess of jurisdiction, but the warrant was irregular in omitting these particulars, and there was, consequently, an irregular exercise of jurisdiction. (b)

Where an Act, passed by the Provincial Legislature, was subsequently disallowed by Her Majesty, but, while it was in force, the plaintiff had been convicted under it by the defendants, as Justices of the Peace, and directed to pay a fine, to be levied according to the Act, and, the fine not having been paid, a warrant was properly issued, by the defendants, for his arrest and imprisonment, which, however, was not executed by the officer to whom it was directed, until after the disallowance of the Act was published in the Gazette, and from its publication, only, the Act ceased :—*Held*, that the defendants were justified in making the conviction and issuing the warrant, and

(a) *Re Delaney v. Macnab*, 21 U. C. C. P. 563.

(b) *Dickson v. Crabb*, 24 U. C. Q. B. 494.

could not be held liable by reason of the warrant being executed after the Act ceased. (a)

The warrant of commitment should shew before whom the conviction was had. It lies on the party alleging that there is a good and valid conviction to sustain the commitment to produce the conviction. (b)

Where a prisoner is in custody of a gaoler, under several warrants, the Magistrate cannot withdraw them, or any of them, from the gaoler's hands, because they are for his protection; but the gaoler ought to know which is the operative warrant, otherwise he may not know whether he is to discharge the prisoner from custody at the end of the time specified in one or in the other. (c)

A warrant ought to set forth the day and year wherein it was made, and it is safe, but perhaps not necessary, in the body of the warrant, to shew the place where it is made, yet it seems necessary to set forth the county in the margin, at least, if it be not set forth in the body.

In strictness, it is not indispensable that the authority of the Magistrate should be shewn on the face of the warrant, for the omission may be shewn by averment and parol evidence. A commitment must be in writing, under the hand and seal of the person by whom it is made, expressing his office or authority, and the time and place at which it is made, and must be directed to the gaoler or keeper of the prison. (d)

A final commitment, for want of sureties to keep the peace, must be in writing. Where, however, a person had been brought up before a Justice, on a charge of threatened assault, and was ordered, by the Justice, to find sureties to keep the peace, he offered bail, who

(a) *Clapp v. Lawrason*, 6 U. C. Q. B. O. S. 319. See 31 Vic. c. 1, s. 7, thirty-fifthly, sixthly, and seventhly.

(b) *Re Crow*, 1 U. C. L. J. N. S. 302; 1 L. C. G. 189.

(c) *Re McKinnon*, 2 U. C. L. J. N. S. 329.

(d) *Reg. v. Reno*, 4 U. C. P. R. 292, per *Draper*, C. J.

were rejected as not being householders, and, being thus prevented from immediately obtaining bail, he remained in custody of a police constable for three hours, during which time the Justice frequently visited him, to ascertain if he had found bail, and at night he was taken to the gaol, where he remained until the following morning, when he was discharged on bail being procured :—*Held*, that this was not a final commitment for want of sureties, and that, consequently, it did not require a written warrant, for the detention was no longer than might be reasonably necessary for ascertaining whether the party could find some one who would become his surety.

(a) The time allowed for this purpose must always depend on the circumstances of each case. (b)

A commitment in default of sureties to keep the peace should shew the date on which the words were alleged to have been spoken, and contain a statement to the effect that complainant is apprehensive of bodily fear. (c)

When articles of the peace have been exhibited in open Court against a person, the Court will direct that he do stand committed until security to keep the peace be given. (d)

Sometimes, in cases of indictable offences, an inquisition is taken by a Coroner, and the prisoner is committed for trial on the verdict of the Coroner's jury. The finding of a Coroner's inquest is equivalent to the finding of a Grand Jury, and a defendant may be prosecuted for murder or manslaughter upon an *inquisition*, which is the record of the finding of a jury sworn to enquire concerning the death of the deceased, *super visum corporis*. Such an inquisition amounts to an indictment. (e)

(a) *Lynden v. King*, 6 U. C. Q. B. O. S. 566.

(b) *Ib.*

(c) *Re Ross*, 3 U. C. P. R. 301.

(d) *Reg. v. Vendette*, 8 L. C. J. 284.

(e) *Reg. v. Ingham*, 5 B. & S. 257 ; 33 L. J. (Q. B.) 183 ; Arch. Cr. Pldg. 116.

An inquest held by a Coroner on a Sunday, being a judicial act, is invalid. (a) A Coroner cannot take a second inquisition on the same body, the first inquisition being valid and subsisting. (b)

A Barrister cannot insist on being present at a Coroner's inquest, and upon examining and cross-examining the witnesses. (c)

Imprisonment is imposed for different purposes. It may be for *prevention*, as by a constable, to hinder a fray, or, by any person, to restrain a misdemeanor or prevent a felony, or for *security*, in criminal cases, before investigation or trial, or until sureties for the peace are given; or in *coercion*, to ensure the performance of some particular act, as in cases of actual contempt, until the contempt be purged, and in cases of supposed contempt, as for not making a return of legal process, or for not paying over moneys raised by such process, by officers of the Court, until return of payment is made, and to enforce the payment of pecuniary fines, or *punitive*, as in criminal sentences. (d)

Where a party, undergoing an imprisonment on conviction of felony, has been released on bail, in consequence of the issue of a writ of error, and such writ of error is subsequently quashed, he may be re-imprisoned for the unexpired term of his sentence, on a warrant of a Judge of the Court of Queen's Bench, signed in Chambers, and granted in consequence of the Court having ordered process to issue to apprehend such party, and bring him before the Court, "or before one of the Justices thereof to be dealt with according to law." (e)

The period of a man's imprisonment must be certain,

(a) *Re Cooper*, 6 U. C. L. J. N. S. 317.

(b) *Reg. v. White*, 7 U. C. L. J. 219; 3 E. & E. 137; 29 L. J. (Q. B.) 257.

(c) *Agnew v. Stewart*, 21 U. C. Q. B. 396.

(d) *M'Innes v. Davidson*, 4 U. C. P. R. 189, per A. Wilson, J.

(e) *Ex parte Spelman*, 14 L. C. J. 281.



and not dependent on the will of the officer, who is charged with the imprisonment. Every judicial act is supposed to happen the first instant of the day it takes place. The imprisonment of a person, therefore, is deemed to commence at the beginning of the day, on which he was adjudged to be imprisoned, and he will be entitled to his discharge, not at the same hour of the day he was brought to prison, but on the first opening of the prison, on the day after his imprisonment expired. (a)

An adjudication mentioned in the margin of the warrant of commitment, where there are several warrants each for a distinct period of imprisonment, that the term of imprisonment mentioned in the second, and third warrants shall commence at the expiration of the time mentioned in the warrant immediately preceding is valid. An adjudication, so stated in the margin, properly forms a part of the warrant, and, even if the portions in the margin of the second, and third warrants could not be read as parts of these warrants, the periods of imprisonment would nevertheless be quite sufficient, the only difference being that all the warrants would be running at the same time, instead of counting consecutively. (b)

A witness, who, on the usual application, has been ordered to withdraw from the Court Room, is guilty of contempt, if *after* his examination he communicates facts disclosed in evidence at the trial, to another witness not examined at the time of the disclosure. (c) In this case, the rule for attachment was discharged, the defendant swearing, in answer, that he did not enter the Court Room during the trial, till called as a witness, that he communicated the fact without any intention of in-

(a) *Reg. v. Scott*, 2 U. C. L. J. N. S. 324, per *J. Wilson*, J.

(b) *Re Crow*, 1 U. C. L. J. N. S. 302; 1 L. C. G. 189. See 32 & 33 Vic., c. 31, s. 63.

(c) *Reg. v. M'Corkill*, 8 L. C. J. 282.

fluencing the evidence to be given by the witness, or of committing a contempt of Court, and in utter ignorance of there being any impropriety in so doing. The affidavit, further, stated that the deponent was wholly unconscious of the possibility of his conduct being considered a contempt.

An attachment will not be granted against a witness, for not obeying a subpoena, unless there is a clear case of contempt, but, if his absence is wilful, the Court will not, in general, look to the materiality of his testimony. (a)

A subpoena, to attend on the 10th September, and so from day to day, was served on the 11th September, and the witness attended for several days, and knew that the cause was not tried:—*Held*, that he was guilty of a contempt in subsequently absenting himself. Where a witness accepted the conduct money, and went with the person who served him with the subpoena, and remained at the Court several days, an attachment was granted against him, for subsequently absenting himself, though he and another person swore in contradiction to the party, who, served the subpoena that the original was not shewn to him, and he also swore that he attended the Court as a Juror, and left in consequence of ill health with the intention of returning, his absence appearing to be wilful. (b)

Where a party is served with a subpoena to attend as a witness, and accepts a sum of money which is tendered to him for his expenses, without objecting to the amount, but refuses to attend on account of his own business, he is liable to an attachment for the non-attendance, even though the sum tendered be less than he is entitled to receive. (c)

(a) *Meloney v. Morrison*, 1 Allen, 240.

(b) *Johnson v. Williston*, 2 Allen, 171.

(c) *Gilbert v. Campbell*, 1 Hannay, 258.

But, if he had objected to the sum when tendered, it would have been an answer to the application. (a)

It is not necessary to shew that the witness was called on his subpoena, if it is shewn by other satisfactory evidence that he did not attend. (b)

An attempt, by a third person to prevent a suitor from laying his case before the Court, by threats of bringing him into disgrace and disrepute, is a contempt of Court and subjects the offender to a heavy fine. (c)

A frivolous opposition, made to retard a judicial sale, is a contempt of Court. (d)

An advocate who publishes in a public newspaper letters containing libellous, insulting and contemptuous statements, and language concerning one of the Justices of the Court, in reference to the conduct of said Justice, while acting in his judicial capacity, on an application made to him in Chambers for a writ of *Habeas Corpus* is guilty of contempt. (e)

In this case, it was held in the Privy Council, reversing the judgment of the Court of Queen's Bench for Quebec, (Crown side) that a Judge of the Court of Queen's Bench, in Quebec, whilst sitting alone, in the exercise of the criminal jurisdiction conferred upon him by Con. Stats. L. C. c. 77, s. 72, has no power to pronounce such advocate in contempt for conduct of the above description, or to impose a fine, and that the proceedings for such contempt could only be legally, and properly, taken in the full Court of Queen's Bench. (f)

An order was made for the delivery of infant children by the father to the mother. On an application to com-

(a) *Gilbert v. Campbell*, 1 Hannay, 258.

(b) *Meloney v. Morrison*, 1 Allen, 240.

(c) *Re Mulock*, 13 W. R. 278; 1 L. C. G. 25.

(d) *Thomas v. Pepin*, 5 L. C. J. 76.

(e) *Reg. v. Ramsay*, 11 L. C. J. 152; S. C. L. R. 3 P. C. App. 427.

(f) *Ib.*

mit the father for a contempt, in not obeying this order, it appeared that, in his absence from home, the children had been removed from his house, and taken to the United States by his son aged fifteen. They denied collusion, the son saying that he acted without his father's knowledge or consent, but the father took no steps to bring the children back, and did not offer to do so, if time were given him. To a demand made for the children, the father replied that they were not in his custody:—*Held*, that he was not excused from obeying the order, and was in contempt. (a)

Affidavits disingenuously drawn up, with a view of presenting inferences, and giving colour to the transactions, to which they refer, inconsistent with the whole truth, even though true as far as they go, should be read with suspicion and carry but little weight. (b)

A contempt of Court being a criminal offence, no person can be punished for such, unless the specific offence charged against him be distinctly stated, and an opportunity given him of answering. (c)

To contempts of Court committed by an individual, in his personal character only, there has been attached by law, and by long practice, a definite kind of punishment by fine and imprisonment. (d)

An order suspending an attorney, and barrister of the Supreme Court of Nova Scotia, from practising in that Court, for having addressed a letter to the Chief Justice reflecting on the Judges and the administration of justice generally in the Court, was discharged by the Judicial Committee of the Privy Council, as it substituted a penalty and mode of punishment, which was not the appro-

(a) *Reg. v. Allen*, 5 U. C. P. R. 453.

(b) *Ib.*

(c) *Re Pollard*, L. R. 2 P. C. App. 106.

(d) *Re Wallace*, L. R. 1 P. C. App. 295, per *Ld. Westbury*.

priate and fitting punishment for the offence. The letter, though, a contempt of Court and punishable by fine and imprisonment, having been written by a practitioner, in his individual and private capacity as a suitor, in respect of a supposed grievance as a suitor, of an injury done to him as such suitor, and having no connection, whatever, with his professional character, or anything done by him professionally, either as an attorney or barrister, it was not competent for the Supreme Court, to go further than award to the offence, the customary punishment for contempt of Court, or to inflict a professional punishment of indefinite suspension for an act not done professionally, and which, *per se*, did not render the party committing it unfit to remain a practitioner of the Court. (a)

The power to punish for contempt is inherent in all Courts, and is a necessary condition of their existence. In Canada, this power is not confined to contempt in the face of the Court, or to pending cases, or to resistance to process; but it extends to the punishment of all contemptuous publications, calumniating or misrepresenting its judicial opinions as a Court, or the opinion or order of any Judge of the Court, pronounced or made either in term, or in vacation, whether in Chambers, or at his own residence, or in any other place, where, within the jurisdiction of the Court, he may be called upon to perform any judicial duty, and to all publications tending to cast ridicule or odium upon the Court, or any of its Judges, in reference to their judicial acts, or to impair the respect and confidence of the public, in the purity and integrity of the tribunal, or any of its members. (b)

An attachment against a Sheriff, for not obeying a rule

(a) *Re Wallace*, L. R. 1 P. C. App. 283; 1 Oldright, 654.

(b) *Reg. v. Ramsay*, 11 L. C. J. 158.

to bring in the body, cannot be granted in vacation by a single Judge at Chambers. (a)

Where an attorney of this Court, practising in an inferior Court has charged, and the Judge has allowed, costs clearly not sanctioned by law, this Court will punish by fine and attachment. (b)

Any Court of Record has power to fine and imprison for contempts, committed in the face of the Court. (c) It seems the commitment may be made *sedente curia*, by oral command without any warrant made at the time. This proceeds on the ground that there is, in contemplation of law, a record of such commitment, which may be drawn up when necessary. (d)

The 32 & 33 Vic., c. 31, s. 65. *et seq*, as amended by the 33 Vic., c. 27, provides for appeals in cases of summary convictions.

The Con. Stats. U. C. c. 114, giving an appeal to the Sessions, on conviction of a person in any matter cognizable by a Justice of the Peace, not being a crime, seems to be still in force. The Act only applies to a matter "not being a crime." (e)

The first Statute would seem to regulate appeals from any of the criminal Statutes of Canada. Under the latter, notice of appeal must be given within four days, after the making of the order or conviction complained against, and eight days before the first Court of General Sessions of the Peace, to be held not sooner than twelve days next, after the order decision or conviction. An appeal, under the former Statutes is subject to the following conditions. If the conviction or order he made more than twelve

(a) *Rex v. Sheriff, Niagara*, Draper, 343.

(b) *Rex v. Whitehead*, Taylor, 476.

(c) *Armstrong v. M'Caffrey*, 1 Hannay, 517.

(d) *Ovens v. Taylor*, 19 U. C. C. P. 53, per *Hagarty*, J.

(e) *Re Meyers*. 23 U. C. Q. B. 613, per *Draper*, J.; *Butt v. Conant*, 1 B. & B. 574.

days, before the sittings of the Court, to which the appeal is given, such appeal shall be made to the then next sittings of such Court; but, if the conviction or order, be made within twelve days of the sittings of such Court, then to the second sittings, next after such conviction or order. The person aggrieved shall give to the prosecutor, or complainant or to the convicting Justice, or one of the convicting Justices for him, a notice in writing of such appeal, within four days after such conviction or order, and the person appealing shall either remain in custody, or give security or in certain cases deposit money as security.

The words, within four days after conviction, exclude the day of conviction. (a)

The person, appealing from a summary conviction by a Justice, must comply with all the conditions, imposed upon him by the Statute, under which he appeals. He must not only give notice within the proper time, but he must also either remain in custody, or enter into the proper recognizance. (b) Where, in the recognizance, the appellant, instead of being bound to appear, and try the appeal, etc., as required by the Act, was bound to appear at the Sessions, to answer any charge that might be made against him, the appeal was dismissed. An application, to take the appellant's recognizance in Court, was refused on the ground that, although the recognizance need not be entered into within four days, it must be entered into, and filed before the sittings of the Court of Quarter Sessions, to which the appeal is made. (c)

It was held, under the former Statutes, that the form of recognizance to try an appeal, given in the schedule to the Con. Stats. Can. c. 103, p. 1130, was sufficient though

(a) *Scott v. Dickson*, 1 U. C. P. R. 366.

(b) *Kent v. Olds*, 7 U. C. L. J. 21.

(c) *Ib.*

the condition differed in form from that provided for by c. 99, s. 117. (a)

Before an appeal can be entertained, it is clearly incumbent on the appellant to shew his right to appeal, by proving compliance with the 33 Vic., c. 27, s. 1, ss. 3, by having remained in custody, or entered into a recognizance. This is a substantial, not a mere technical, objection to the appeal, and is not waived by the respondent asking for a postponement, after the appellant has proved his notice of appeal on the first day of the Court. (b)

A notice of appeal following the form given in the Con. Stats. Can. c. 103, p. 1130, and stating "that the formal conviction drawn up and returned to the Sessions, is not sufficient to support the conviction, etc." is sufficiently particular to allow all objections being raised, which are apparent on the face of the conviction or order. (c)

It appears to be the established practice for the Sessions to hear appeals on the first day, but there is no law compelling them to do so. (d)

One D. M., having been on the 27th of August, 1862, convicted before Justices of the Peace, "for allowing card-playing at his inn, and other disorderly conduct during this year" was fined \$20 and costs. On judgment being pronounced, he remarked that he would pay the fine, etc., but he "would see further about it." On the 30th of August, notice of appeal was given to the prosecutor, and to one of the convicting Justices, and, on the 11th of September, the appeal came on at the Quarter Sessions, when the Court decided that the right to appeal was waived and lost by reason of the plaintiff,

(a) *Re Wilson*, 23 U. C. Q. B. 301.

(b) *Re Meyers*, 23 U. C. Q. B. 611.

(c) *Helps and Eno*, 9 U. C. L. J. 302.

(d) *Re Meyers*, 23 U. C. Q. B. 614, per *Draper*, C. J.



having paid the fine and costs. The Court, under these facts held that there was no waiver of the right to appeal, that the statement of the defendant was capable of meaning that he meant to use any remedy that was by law, open to him whether by appeal or otherwise, and as the Act respecting appeals does not require notice of appeal to the convicting Justice, nor provide for a stay of the levy, it might be reasonably inferred that he paid the fine and costs, to prevent the distress and sale, which might have taken place, although he had at the moment of conviction, given the most formal notice of appeal. (a)

The Court should rather lean to the hearing of appeals than to dismissing them on technical grounds. (b)

An appeal from a conviction for selling liquor without license, contrary to the (Ont.) 32 Vic., c. 32, must be tried by the chairman of the General Sessions without a jury. (c)

It has been held that, on appeals from summary convictions, under Con. Stats Can., c. 91, s. 37, to the Court of General Sessions of the Peace, the appellant could not, of right, demand that a jury be empanelled to try the appeal, and that it was discretionary with the Court, under c. 99, ss. 117 and 119, to try the appeal or to grant a jury. (d) A trial by jury was warranted by the 13 & 14 Vic., c. 54. (e)

It would appear that, as the law now stands, it is discretionary with the Court to grant a jury at the request of either appellant or respondent. But, if a jury be not so demanded, it is imperative on the Court to try the appeal, and they shall be the absolute Judges, as well of

(a) *Re Justices, York*, 13 U. C. C. P. 159.

(b) *Ib.* 162, per *Draper*, C. J.; *Re v. Justices, Norfolk*, 5 B. & A. 992.

(c) See s. 36; *Re Brown*, 8 C. L. J. N. S. 81.

(d) *Gilchen and Eaton*, 13 L. C. R. 471; 10 U. C. L. J. 81.

(e) *Hespeler and Shaw*, 16 U. C. Q. B. 104.

the *fact* as of the law, in respect to the conviction or decision appealed from. (a)

When the appeal is under the Con. Stats. U. C., c. 114, the Court may, at the request of either party, empanel a jury. (b)

The Court of Quarter Sessions has power to adjourn the hearing of a part-heard appeal to a subsequent Sessions. (c)

The 33 Vic., c. 27, s. 1, ss. 3, declares that the Court shall have power, if necessary, from time to time, by order endorsed on the conviction or order to adjourn the hearing of the appeal from one sittings to another or others of the said Court. An adjournment of the sessions is a continuance of the same sessions or sittings. (d)

It would seem, however, that no recent Statute confers power to adjourn the hearing of an appeal, under the Con. Stats. U. C., c. 114. Under this Statute there is no power of adjournment, and the appeal must be heard at the Court of Quarter Sessions appealed to, for the Act provides that the Court shall, *at such* sessions, hear and determine the matter of such appeal. (e) Where, therefore, such Court, after proof of entry and notice of the appeal, adjourned the further hearing, by order, until the next sittings, and then made an order quashing the conviction, the orders were quashed. (f) So it is quite clear from the language of this Statute, that the costs of an appeal from a Justice's conviction, as well as the appeal itself, must be determined at the sessions appealed to. (g)

An appeal, dismissed for want of prosecution, may, at

(a) See 32 & 33 Vic., c. 31, s. 66. See also 33 Vic., c. 27, s. 1 ss. 3.

(b) See s. 3.

(c) *Reg. v. Guardians, Cam. Union*, 7 U. C. L. J. 331.

(d) *Rawnsley v. Hutchinson*, L. R. 6 Q. B. 305.

(e) *Re McCumber*, 26 U. C. Q. B. 516, following *Reg. v. Belton*, 11 Q. B. 379.

(f) *Ib.*

(g) *Reg. v. Murray*, 27 U. C. Q. B. 134.

the instance of the appellant, and satisfactorily accounting for his non-appearance, be reinstated. (a)

The 4 Wm. 4, c. 4, ss. 17 and 18, were, in substance, the same as the Con Stats. U. C., c. 114. On an appeal to the Sessions, under the 4 Wm. 4, c. 4, evidence, differing from, or additional to, that produced before the convicting Justice, might have been received and gone to the jury, although the general principle of appeals is, that a judgment is to be rendered upon the same facts that were before the inferior tribunal. It was held to be the intention of the Legislature, in passing the above Statute, to allow an open trial, by a jury, upon such evidence as might be adduced there. (b)

The 32 & 33 Vic., c. 31, s. 66, now provides that no witnesses shall be examined who were not examined before the Justice, on the hearing of the case, and this whether the appeal is tried by the Court or a jury. The Con. Stats. U. C. c. 114, contains no analogous provision.

When a prisoner had been convicted before Justices of the Peace, under the Petty Trespass Act, and fined, and on appeal to the Quarter Sessions, the Justices there admitted more evidence than had been heard on the conviction, and this fresh evidence adduced, evidently, influenced the verdict of the jury at the Sessions, and the accused was acquitted; but, on receiving the opinion of the Attorney-General that the additional evidence should not have been admitted, they confirmed the conviction and ordered it to be recorded, but took no notice of the acquittal. The Court made absolute a rule for a *mandamus*, compelling them to enter the acquittal. (c)

Where a rule *nisi*, for a *mandamus* to the Sessions, commanding them to hear an appeal, called upon the

(a) *Re Smith*, 10 U. C. L. J. 20.

(b) *Rex v. Justices of Bathurst*, 5 U. C. Q. B. O. S. 74.

(c) *Rex v. Justices, Bathurst*, 4 U. C. Q. B. O. S. 340.

Court of Quarter Sessions, in and for the United Counties, etc., instead of the Justices of the Peace for the United Counties, and the rule had been enlarged in the prior term. On objection to the rule, on the above ground, it was replied that the enlargement waived the objection, and this seems to have been acquiesced in by counsel and by the Court. (a) In fact, it seems that, in all cases, formal and technical objections are waived by an enlargement. (b)

The appellant having been convicted of an assault, under the Con. Stats. Can., c. 91, s. 37, appealed to the Quarter Sessions. On the first day of the Court, after he had proved his notice of appeal, at the respondent's request, the case was postponed until the following day, and the respondent then objected to the jurisdiction, as it was not shewn that the appellant had either remained in custody, or entered into a recognizance, as required by Con. Stats. Can., c. 99, s. 117. The Court held that this objection was not waived by the application to postpone. (c)

For the purpose of preventing frivolous appeals, the 32 & 33 Vic., c. 31, s. 69, enables the Court of Sessions, on proof of the giving of notice of appeal, though such appeal was not afterwards prosecuted or entered, if it has not been abandoned according to law, to order the payment of reasonable costs, by the party giving the notice.

There is nothing in the Con. Stats. U. C., c. 114, to authorize an order that a defendant, who has appealed and been acquitted by a jury, upon his trial, shall pay the costs of the appeal and trial, or any portion of them.

Where the Court of Quarter Sessions ordered a party to pay certain costs of an appeal, and, they not being paid,

(a) *Re Justices, York*, 13 U. C. C. P. 159.

(b) *Reg. v. Allen*, 5 U. C. P. R. 453-8.

(c) *Re Meyers*, 23 U. C. Q. B. 611.

an indictment was preferred for non-payment thereof, and, on this indictment, the defendant was found guilty; —*Held*, that the indictment could not be supported, either at common law or under the Statute. (a)

The Court will not give costs, on adjourning an appeal, unless the objection is made at the time of the adjournment. (b)

Under the English Act, 20 & 21 Vic., c. 43, the Court will not entertain an application for costs of an appeal against a decision of a Justice, in the term after that in which judgment is pronounced. (c)

It seems doubtful whether, under the 32 & 33 Vic., c. 31, s. 74, an order of Sessions, simply ordering costs of an appeal to be paid, without directing them to be paid to the Clerk of the Peace, as required by the Act, is regular. (d)

Where a rule for amendment is opposed, the costs must be paid by the successful party. (e)

Where one of the Justices, before whom a person was convicted for breach of the license laws, stated that all the papers necessary to perfecting the appeal, were filed, except the bond telling the party it was all right, the Court allowed the appeal, though no affidavit had been filed. (f)

Under the Rev. Stat., c. 95, an appeal under the River Fisheries Act, must be made to the Sessions. (g)

The 32 & 33 Vic., c. 30, s. 41, empowers the Justice before whom a prisoner is charged with an indictable offence, to remand, from time to time, for such period as

- (a) *Reg. v. Orr*, 12 U. C. Q. B. 57.
- (b) *Re M'Cumber*, 26 U. C. Q. B. 516.
- (c) *Budenberg and Roberts*, L. R. 2 C. P. 292.
- (d) *Re Delaney v. Macnab*, 21 U. C. C. P. 563.
- (e) *M'Kay v. M'Kay*, 2 Thomson, 75.
- (f) *M'Kay v. M'Kay*, 2 Thomson, 75.
- (g) *Gough v. Morton*, 2 Thomson, 10.

may be reasonable, not exceeding eight clear days at any one time. S. 42 authorizes a verbal remand where the time does not exceed three clear days.

A remand for an unreasonable time would be void. (a) It seems doubtful whether a Judge sitting in Chambers has power, on an application of a prisoner for his discharge on a bad warrant, to remand him. (b)

On discharging a jury charged with a prisoner, because they are unable to agree, the Court has power, and it is the duty of the Judge, to remand the prisoner to gaol until delivered in due course of law, or to the next sessions of the Court, fixing or not fixing the day, as the case may be. (c)

When prisoners are remanded to prison, after the disagreement of the jury on the trial, they are detained, not upon the indictment, which is only the accusation and charge found for their trial, but upon the original commitment for the offence originally charged. (d)

It would seem that the Con. Stats. U. C., c. 112, as to the reservation of points of law in criminal cases, only confers on the Sessions authority to state a case for the opinion of the Superior Court, where the original hearing and conviction is, at the Sessions, and that, when a summary conviction is appealed to the Sessions, there is no power to reserve a case on such appeal. (e)

The appellant, having been convicted before Justices of having pretended to be a physician, contrary to 29 Vic., c. 34, s. 34, appealed to the Quarter Sessions and was found guilty. The chairman having reserved certain questions for the opinion of the Court, it was held that the Sessions had no power to reserve a case for the

(a) *Connors v. Darling*, 23 U. C. Q. B. 547-51, per *Hagarty*, J.

(b) *Re Carmichael*, 10 U. C. L. J. 325.

(c) *Ex parte Blossom*, 10 L. C. J. 32, per *Monk*, J.

(d) *Ib.* 41, per *Badgley*, J.

(e) *Pomeroy and Wilson*, 26 U. C. Q. B. 45.

opinion of the Court, under the Statute, for the appellant was not a person "convicted of treason, felony, or misdemeanor," within the Statute, nor would the case fall within ss. 3 or 4 of the Statute. (a)

Prior to the passing of the 20 Vic., c. 61, Con Stats. U. C., c. 113, it was doubtful whether, after the affirmance of a conviction by the Sessions, a further appeal lay to either of the Superior Courts of common law. (b)

The 20 Vic., c. 61, has been repealed, (c) and it would seem that the law now stands as before the passing of this Statute.

The Court would not hear an appeal under this Statute, unless its provisions, and the rules of Court prescribing the preliminary steps, were strictly complied with. (d)

In this case, the rule or order appealed from was made before Hilary Term, 1865. The case was not transmitted to the Superior Court, pursuant to s. 2, on or before the first day of the term *next after* the making of the rule or order appealed from. Second, the notice required by the first rule of Court, dated 13th February, 1858, was not transmitted with the papers. Third, the third rule was not complied with, as the papers sent to the Superior Court shewed that, on a motion for a new trial, the defendants were to appear on the 27th December, and were bailed to appear for sentence; but it was not shewn whether they appeared for sentence, or were sentenced, or were in prison, or discharged on bail, to appear and receive judgment. Fourth, nor was the fourth rule observed, as the papers therein referred to were not deli-

(a) *Pomeroy and Wilson*, 26 U. C. Q. B. 45; See also *Yearke v. Bingleman*, 28 U. C. Q. B. 551.

(b) *Reg. v. Watson*, 7 U. C. C. P. 495; *Victoria P. R. Co. v. Simmons*, 15 U. C. Q. B. 303; *Reg. v. Hussey*, 2 U. C. P. R. 194.

(c) See 32 & 33 Vic., c. 36, Sched. B.

(d) *Reg. v. Hatch*, 15 U. C. C. P. 461.

vered to the Clerk of this Court, until after the first day of the sitting of the Court, in Easter Term, 1865. For these reasons, the Court declined to hear the appeal.

The Judge of the Sessions of the Peace, being vested with all the powers of two Justices of the Peace, by c. 102, s. 1, and c. 103, s. 82, of the Con. Stats. Can., and by c. 102, s. 3, of the Con. Stats. of Lower Canada, no appeal lies from a conviction rendered by him under Con. Stat. L. C., c. 6. (a)

The 29 & 30 Vic., c. 45, was passed to extend the remedy, by *Habeas Corpus*, and enforce obedience thereunto, and prevent delays in the execution thereof.

In doubtful cases, the Court always inclines in favour of liberty. (b) It, therefore, is the duty of a Judge hearing an application for discharge, under a writ of *Habeas Corpus*, when a prisoner is restrained of his liberty, under a Statute, to discharge him, unless satisfied, by unequivocal words in the Statute, that the imprisonment is warranted by the Statute. (c) It is also the duty of the Judge, when doubting the sufficiency of the warrant of commitment, to discharge the prisoner. (d)

It would seem that a Judge, in Chambers, has, at common law, power to issue writs of *Habeas Corpus*, in cases not within the 31 Car. 2, c. 2. (e) But it seems doubtful whether a Judge, in Chambers, has power to rescind his own order for a writ of *Habeas Corpus*, or to quash the writ itself, on the ground that it issued improvidently; or to call upon the prosecutor or Justice to shew cause why a writ of *Habeas Corpus* should not issue, instead of at once ordering the issue of the writ. (f)

(a) *Ex parte Slack*, 7 L. C. J. 6.

(b) *Reg. v. Hoyle*, 4 U. C. P. R. 264, per *Morrison*, J.

(c) *Re Slater*, 9 U. C. L. J. 21.

(d) *Re Beeler*, 3 U. C. P. R. 270.

(e) *Re M'Kinnon*, 2 U. C. L. J. N. S. 327, per *A. Wilson*, J.

(f) *Re Ross*, 3 U. C. P. R. 301.



A Judge, sitting in *Banc* during term, in the Practice Court, has no authority, under Con. Stats. U. C., c. 10, s. 9, to grant a rule *nisi* for a writ of *Habeas Corpus ad subjiciendum*; for, until the rule is moved, there is no cause or business depending, in relation to the prisoner's conviction or commitment. Where such rule had been issued there, returnable in full Court, it was discharged on this preliminary objection. (a)

At common law, the Judges of the Superior Courts of common law for Ontario have power to direct the issue of writs of *Habeas Corpus ad subjiciendum*, in vacation, returnable either in term or vacation. (b)

The 29 & 30 Vic., c. 45, s. 1, confers full authority on any of the Judges of either of the Superior Courts of law or equity in Ontario to award, in vacation time, a writ of *Habeas Corpus ad subjiciendum*, under the Seal of the Court wherein the application shall be made.

Where the proper remedy is by writ of error, a *Habeas Corpus* will not be granted. (c)

A writ of *Habeas Corpus* has been refused in the case of a person confined in gaol, under civil process, such as a *capias ad respondendum*. (d)

As the Imp. Stat. 56 Geo. 3, c. 100, is not in force in this country, it is, at least, doubtful whether a Judge, in Chambers, has power to order the issue of a writ of *Habeas Corpus*, where the custody is not for criminal or supposed criminal matter. And where, upon the return of a writ of *Habeas Corpus*, it appeared that the prisoner was in custody, under a writ of *capias*, issued out of a County Court, and regular on its face, but which, it was contended, had been improperly issued, on defective

(a) *Reg. v. Smith*, 24 U. C. Q. B. 480.

(b) *Re Hawkins*, 3 U. C. P. R. 239.

(c) *Re M'Kinnon*, 2 U. C. L. J. N. S. 327.

(d) *Barber v. O'Hara*, 8 L. C. R. 216.

materials, a Judge, sitting in Chambers, refused to discharge the prisoner. (a)

The 29 & 30 Vic., c. 45, expressly excepts persons imprisoned for debt, or by process in any civil suit.

It would seem, therefore, that the writ cannot now be obtained in the case of a person confined under a *capias ad respondendum*, in a civil suit.

A *Habeas Corpus* will not be granted to bring up a prisoner under sentence of conviction at the Sessions for larceny. (b)

A Judge has no jurisdiction, on a writ of *Habeas Corpus*, to liberate a person found guilty of simple larceny, and sentenced to be imprisoned in the Penitentiary for life, although it may appear that the sentence is illegal. The Judge to whom an application for such writ is made, having no jurisdiction to reverse the sentence, must abstain from giving an opinion upon the legality or illegality of such sentence. (c)

The mere fact of the warrant of commitment having been countersigned, under the 31 Vic., c. 16, s. 1, by the Clerk of the Privy Council, does not withdraw the case from the jurisdiction of a Judge, on a *Habeas Corpus*. (d)

At common law, a writ of *Habeas Corpus, ad testificandum*, may be issued to the Warden of the Provincial Penitentiary, to bring a convict for life before a Court of *Oyer and Terminer*, and general gaol delivery, to give testimony, on behalf of the Crown, in a case of murder. The writ may be granted before the sittings of the Court commence. (e)

Under the 4 & 5 Vic., c. 24, s. 11, a Court of *Oyer and*

(a) *Re Bigger*, 10 U. C. L. J. 329; *Re Hawkins*, 9 U. C. L. J. 298, doubted. See, however, *Re Runciman v. Armstrong*, 2 U. C. L. J. N. S. 165.

(b) *Reg. v. Crabbe*, 11 U. C. Q. B. 447.

(c) *Ex parte Plante*, 6 L. C. R. 106.

(d) *Reg. v. Boyle*, 4 U. C. P. R. 256.

(e) *Reg. v. Townsend*, 3 U. C. L. J. 184.

*Terminer* could, while sitting, make an order to any gaol or prison out of the county where the Court was sitting, to bring up a prisoner, in order to give evidence at the trial. But under this Statute, no order could be made until the opening of the Court. (a)

Now, the 32 & 33 Vic., c. 29, s. 60, provides that an order may be made on the Warden of the Penitentiary to deliver the prisoner to the person named in such order to receive him, and the latter shall convey the prisoner to the place of trial, to obey such further order as to the Court may seem meet.

Where an offender, for whose arrest a Magistrate's warrant is issued, lives in a county different from that where the warrant issued, and the warrant is backed to take him in the county where he resides, and it is there found that he is a prisoner for debt, in close custody, in such county, he may be removed, under a writ of *Habeas Corpus ad subjiciendum*. (b)

A prisoner is not entitled to a *Habeas Corpus*, under the 31 Car. 2, c. 2, unless there be a "request, in writing, by him, or any one on his behalf, attested and subscribed by two witnesses, who were present at the delivery of the same." (c)

As a general rule, the affidavit on which an order for a writ of *Habeas Corpus* is moved should be made by the prisoner himself, or some reason, such as coercion, shewn for his not making it.

The affidavit should be entitled, in one or other of the Superior Courts, though it is discretionary with the Judge to whom the application is made, to receive an affidavit of a different kind, or one not sworn by the prisoner himself. (d)

(a) *Reg. v. Townsend*, 3 U. C. L. J. 184.

(b) *Reg. v. Phipps*, 4 U. C. L. J. 160.

(c) *Re Carmichael*, 1 U. C. L. J. N. S. 243.

(d) *Re Ross*, 3 U. C. P. R. 301; 10 U. C. L. J. 133.

It is sufficient to return to a writ of *Habeas Corpus* a copy of the warrant under which the prisoner is detained, and not the original. (a) But the authority of this case has been doubted, and seems very questionable. It has been subsequently held that the person to whom a writ of *Habeas Corpus* is directed, commanding him to return "the cause of taking and detainer," must return the original, and not merely a copy of the warrant. (b)

Where a prisoner is brought up upon a writ of *Habeas Corpus*, and the return shews a commitment bad upon the face of it, the Court will not, on the suggestion that the conviction is good, adjourn the case, for the purpose of having the conviction brought up, and amending the commitment by it. (c)

Where a prisoner is, under a writ of *Habeas Corpus*, discharged from close custody, on the ground that the warrant of commitment charges no offence, he is not, under 31 Car., 2, c. 2, s. 6, entitled to his discharge, as against a subsequent warrant, correctly stating the offence, upon the alleged ground that the second is "for the same offence" as the first arrest. (d)

The Court refused to discharge a prisoner brought up on *Habeas Corpus*, charged with having murdered his wife in Ireland; communication having been made by the Provincial to the Home Government on the subject, and no answer received, and the prisoner having been in custody less than a year. (e) The object of the 31 Vic., c. 16, was to suspend the operation of the writ of *Habeas Corpus*, and to deprive the subject restrained of his liberty. (f)

(a) *Re Ross*, 3 U. C. P. R. 301; 10 U. C. L. J. 133.

(b) *Re Carmichael*, 10 U. C. L. J. 325.

(c) *Re Timson*, L. R. 5. Ex. 257.

(d) *Re John Carmichael*, 1 U. C. L. J. N. S. 243.

(e) *Rex v. Fitzgerald*, 3 U. C. Q. B. O. S. 300.

(f) *Re Boyle*, 4 U. C. P. R. 261, per *Morrison*, J.

Although Justices of the Peace, exercising summary jurisdiction, are the sole Judges of the weight of evidence given before them, and no other of the Queen's Courts will examine whether they have formed the right conclusion from it or not ; yet other Courts may, and ought to, examine whether the premises stated by the Justices are such as will warrant their conclusion, in point of law. (a)

When a matter is within the jurisdiction of Justices, and their proceedings are regular and according to law, the Court will not interfere with their decision, though it should be wrong or unjust, but the Court will enquire whether the case was within their jurisdiction or not. Thus, where the nature of the charge is doubtful, and, in the course of the enquiry, it turns out that the case is not one over which they have jurisdiction, the Superior Court may, on *Habeas Corpus*, examine the evidence and entertain the question of jurisdiction. (b)

Where a fact is to be proved which is the very essence of the enquiry, and there is evidence before the Justices on the one side and the other, the Court will not, although they may think that, upon the evidence, the Justices have come to a wrong conclusion, review their decision.

In all cases in which Justices have to decide a collateral matter, before they have jurisdiction, and they give themselves jurisdiction by finding facts which they are not warranted in finding, the Court will review their decision, and, if they have improperly given themselves jurisdiction, will set aside the proceedings ; but, where the question is a material element, in the consideration of the matter, they have to determine, and they, exercising their judgment as Judges of the fact, have decided it, on a

(a) *The Scotia S. V. A. R.* 160.

(b) *Re McKinnon*, 2 U. C. L. J. N. S. 327-8, per A. Wilson, J.

conflict of evidence, it is contrary to principle and practice to interfere. (a)

The Court of Queen's Bench cannot review the decision of an inferior tribunal. on a matter within its jurisdiction, and on which it has heard evidence and arrived at a conclusion.

Where a charge was preferred to a Court of Quarter Sessions, under 1 Wm. & M., c. 21, s. 6, against a Clerk of the Peace, for a misdemeanor in his office, and evidence was taken, and the Court decided that the charges were proved, and dismissed the Clerk of the Peace from his office, and appointed another person in his place :—*Held*, on a *quo warranto* information against the person so appointed, that the sufficiency of the evidence was a question entirely for the Court of Quarter Sessions, and the decision of that Court could not be reviewed by the Court of Queen's Bench. (b)

Except when applied for, on behalf of the Crown, a *certiorari* is not a writ of course. (c). The granting or refusing of the writ rests in the discretion of the Court, and, where the proceedings sought to be removed were completely spent, and no benefit would arise from re-opening them, the order was refused. (d)

The Court must be satisfied on affidavits that there is sufficient ground for issuing it; and it must, in every case, be a question for the Court to decide whether, in fact, sufficient grounds do exist. Where a man is chosen into an office or place, by virtue whereof he has a lawful right, and is deprived thereof by an inferior jurisdiction who proceed, in a summary way, in such case, he is entitled to a *certiorari ex debito justitiæ*, because he has no

(a) *Ex parte Vaughan*, L. R. 2 Q. B. 116, per Cockburn, C. J.

(b) *Reg. v. Russell*, 5 U. C. L. J. N. S. 129; 17 W. R. 402.

(c) *Reg. v. Justices, Surrey*, L. R. 5 Q. B. 466.

(d) *Reg. v. Ld. Newborough*, L. R. 4 Q. B. 585.

other remedy, being bound by the judgment of the inferior jurisdiction. (a)

In other cases, where the application is by the party grieved, so as to answer the same purpose as a writ of error, it might be treated like a writ of error, as *ex debito justitiæ*; but, where the applicant is not a party grieved, who substantially brings error to redress his private wrong, but comes forward as one of the general public, having no particular interest in the matter, and, if it thinks that no good would be done to the public, it is not bound to grant it, at the instance of such a person. (b)

When a Statute gives an appeal, this does not take away the right to a *certiorari*. The right can only be taken away by express words; and, for this reason, the power given to a Judge by the (N. B.) Rev Stat., c. 161, s. 32, to hear appeals from summary convictions before Justices of the Peace, does not take away the right of this Court to grant a writ of *certiorari* to remove such conviction. (c)

Many authorities establish that a writ of *certiorari* may, in some cases, be granted, though expressly taken away by Statute. (d) Thus, the writ may be granted, notwithstanding 31 Vic., c. 42, s. 21, provided there be ground for the belief that the conviction was had without proof, where the Act provides that it shall be on proof to the satisfaction of the Justice. (e)

So a writ of *certiorari* will be granted to remove a conviction to the Superior Court, notwithstanding it is taken away by the Con. Stats. L. C., c. 6, s. 49, under which the conviction was had. (f)

(a) See *Reg. v. South Holland* D. C. 8 A & E. 429.

(b) *Reg. v. Justices, Surrey*, L. R. 5 Q. B. 472-3.

(c) *Ex parte Montgomery*, 3 Allen, 149. See also *Rex v. Gingras*, S. L. C. A. 560.

(d) *Reg. v. Hoggard*, 30 U. O. Q. B. 156. per *Richards*, C. J.

(e) *Ex parte Morrison*, 13 L. C. J. 295.

(f) *Ex parte Church*, 14 L. C. R. 318. See also *ex parte Lalonde*, 15 L. C. J. 251.

If a Statute declares that a *certiorari* shall not issue, it, nevertheless, may issue where there is a plain excess of jurisdiction, for the prohibition in the Statute would not be held to apply when the Justices or Sessions had interfered in a matter not within their jurisdiction. (a) So it lies where there is an absence of jurisdiction in the convicting Justice, or a conviction, on its face, defective in substance. (b)

An enactment that proceedings of an inferior Court shall be final, does not take away the jurisdiction of the Supreme Court to review the proceedings, under a writ of *certiorari*. (c)

There can be no *certiorari* after judgment, and the only course then is a writ of error. (d) Nor can an indictment be removed, by *certiorari*, from the Court of General Sessions to the Queen's Bench, after verdict and *before* judgment, even by the consent of parties, for their consent will not authorize an unprecedented course in a criminal case. (e)

After verdict of acquittal for nuisance, on an indictment tried at the Assizes, a motion was made, with the concurrence of the Attorney-General, for a *certiorari*, to remove the indictment, with a view to obtain a new trial, no ground being shewn by affidavit :—*Held*, that there was nothing to warrant the ordering of a *certiorari*. (f)

Where a conviction was made, under the Con. Stats. U. C., c. 75, and, on appeal to the sessions, the appeal was adjourned to another sessions, when the conviction was quashed :—*Held*, that a *certiorari* might issue to remove the order quashing the conviction. (g)

(a) *Hespeler and Shaw*, 16 U. C. Q. B. 104.

(b) *Re Watts*, 5 U. C. P. R. 267.

(c) *Barnaby v. Gardiner*, 1 James, 306.

(d) *Reg. v. Crabbe*, 11 U. C. Q. B. 447 ; *Reg. v. Smith*, 10 U. C. Q. B. 99.

(e) *Reg. v. Lafferty*, 9 U. C. Q. B. 306.

(f) *Reg. v. Gzowski*, 14 U. C. Q. B. 591.

(g) *Re Doyle*, 4 U. C. P. R. 32.



Where a conviction, under the 8 Vic., c. 45, is appealed to the Sessions, and tried before a jury, and affirmed on the appeal, a *certiorari* will lie not to examine the finding of the jury on the facts, or whether they had before them sufficient evidence of the offence, but to determine whether the Justices had exceeded their jurisdiction in convicting for an offence, which was not within the Statute. (a) A *certiorari* will lie for excess of jurisdiction, and illegality in the proceedings of Commissioners appointed by the Governor of the Province, under the Ordinance, 31 Geo. 3, c. 6, for the building and repairing of churches. (b) But a party, imprisoned for contempt of the Court of Sessions, cannot have his conviction removed by *certiorari*. (c)

In a prosecution, under the Act 5 Wm. 4, c. 2, for non-performance of Statute labour, it must be proved that the party has been notified, by the overseer, of the time and place of meeting to perform the work, and where the affidavits, in answer to an application for a *certiorari* to remove the proceedings in such a prosecution, stated that the party had been duly notified, the Court made the rule absolute, in order to ascertain what the notice really was, the appellant having in his affidavit denied notice. (d)

Mere irregularities, in the proceedings of the Superior Court, are not sufficient to justify the granting of a writ of *certiorari*; but there must be proof that actual injustice has been done. (e) Where a defendant applies for a *certiorari* to remove an indictment, he must shew that it is probable the case will not be fairly or satisfactorily tried in the Court below, and if difficulties in point of law form

- (a) *Hespeler and Shaw*, 16 U. C. Q. B. 104.
- (b) *Rex v. Gingras*, S. L. C. A. 560.
- (c) *Ex parte Vallieres de St. Real*, S. L. C. A. 593.
- (d) *Ex parte Ferguson*, 1 Allen, 663.
- (e) *Ex parte Gauthier*, 3 L. C. R. 498.

the ground of the application, they must be specifically stated, and no mere general statement will suffice. (a)

Where the defendant, having been convicted on the information of a toll gate keeper of evading toll, appealed to the Sessions, where he was tried before a jury, and acquitted, this Court refused a writ of *certiorari* to remove the proceedings, the effect of which would be to put him a second time on trial. (b) It would seem that after an acquittal at the Sessions, the writ cannot be granted; at all events, at the instance of a private prosecutor. (c) A conviction, under the Con. Stats. L. C., c. 6, by a Judge of the Sessions of the Peace cannot be brought up before the Superior Court by *certiorari*. (d)

Two persons were convicted of selling intoxicating liquors without licence, in a township, where the sale of intoxicating liquors, and *the issue* of licences authorising the sale, were prohibited under the "Temperance Act of 1864," 27 & 28 Vic., c. 18. A memorandum of the conviction simply stating it to have been a conviction for selling liquor, without a licence was given by the Justices to the accused. An application for a writ of *certiorari* to remove the conviction was refused, for it would seem, although the issue of a licence is prohibited by a by-law, it is still an offence under (Ont), 32 Vic., c. 32, to sell liquor without a licence, and even if the conviction had been under the Temperance Act of 1864, and not under (Ont.) 32 Vic., c. 32, it was amendable under 29 & 30 Vic., c. 50. (e)

But, as neither the (Ont) 32 Vic., c. 32, or the 27 & 28 Vic., c. 18, authorize an appeal to any Court, it would

(a) *Re Kellett*, 2 U. C. P. R. 102; *Reg. v. Jowle*, 5 A. & E. 539; *Reg. v. Josephs*, 8 Dowl. P. C. 128.

(b) *Re Stewart*, 2 L. C. G. 24.

(c) *Ib.* See *Reg. v. Lafferty*, 9 U. C. Q. B. 306.

(d) *Ex parte Vaillancourt*, 16 L. C. R. 227.

(e) *Re Watts*, 5 U. C. P. R. 267.

defeat their objects to grant a *certiorari* to remove a conviction for the purpose of quashing it, in respect of a matter, not appearing upon the conviction itself to be a defect rendering it bad, and which, if the appeal had not been taken away would have been rectified on an appeal. (a)

Proceedings had under the 31 Vic., c. 42, s. 18, are of such a character, as to be susceptible of being removed by *certiorari*. (b)

An Ecclesiastical decree of the Archbishop of Quebec, for the erection of a parish is not a civil proceeding, subject to revision by *certiorari*, so long as no proceedings have been taken for obtaining a ratification of such decree by the civil authorities. (c) The powers exercised by commissioners, under the 2 Vic., c. 29, s. 4, as to erection of parishes are not judicial powers, subject to revision by *certiorari* (d)

The Superior Court of Montreal has no jurisdiction to grant a writ of *certiorari*, to bring up a conviction had before a Justice of the Peace, in the district of Three-Rivers. (e)

A *certiorari* only substitutes the Superior Court for the Court below, and, whatever ought to have been done there, had the case remained there, it must be the duty of Superior Court to do, when the case is removed. (f)

An application for a *certiorari* should be made at the first term, after the conviction, but where the Justice had no jurisdiction in the matter, a *certiorari* was granted, though a term had elapsed (g) Where an appeal from a summary conviction is made to a Judge of this Court,

(a) *Re Watts*, 5 U. C. P. R. 270, per Gwynne, J.

(b) *Ex parte Morrison*, 13 L. C. J. 295

(c) *Ex parte Guay*, 2 L. C. R. 292.

(d) *Ex parte Lecours*, 3 L. C. R. 123.

(e) *Ex parte Cumming*, 3 L. C. R. 110.

(f) *Reg. v. Wightman*, 29 U. C. Q. B. 214, per Morrison, J.

(g) *Ex parte Mulhern*, 4 Allen 259.

under the (N.B.) 1 Rev. Stat. c. 161, s. 32, which provides that an appeal from a summary conviction shall be made in the same manner as from a judgment in a civil suit, (a) and refused by him, a subsequent application to this Court for a *certiorari*, should, in general, be made at the first term afterwards. The Court refused to interfere in such a case, after the lapse of one term, where the conviction appeared to be sufficient on the merits. (b) An application for a *certiorari* to remove proceedings under the Highway Act, 13 Vic., c. 4, though no time is limited, by law, should be made without unreasonable delay. But a delay of one term is not unreasonable. (c)

By the 13 Geo. 2, c. 18, s. 5, the writ must be sued out within six calendar months, next after the making of the conviction, judgment or order sought to be removed. This provision does not bind the Crown. (d)

A writ of *certiorari* allowed before the expiration of six months from the day of the conviction, but not sued out until after the expiry of the six months will be quashed. (e)

A *certiorari* not prosecuted during six months will be dismissed on motion. (f)

The Statute further enacts that no writ of *certiorari* shall thenceforth be granted, issued forth, or allowed, to remove any conviction, order, etc., made by or before any Justice or Justices of the Peace, or the General Quarter Sessions, unless it be duly proved upon oath that the party suing out the same hath given six days' notice thereof, in writing, to the Justice or Justices, or any two of them, if so many there be, by and before whom such conviction, etc., shall be so made to the end that such Justice, or the

(a) See c. 137, s. 44.

(b) *Ex parte O'Regan*, 3 Allen, 261.

(c) *Ex parte Herbert*, 3 Allen, 108.

(d) *Rex v. Justices, Newcastle, Draper* 121.

(e) *Rex v. Chillas*, Rob. Dig. 74.

(f) *Ex parte Boyer*, 2 L. C. J. 188-9; *ex parte Prefontaine*, *ib.* 202.

parties therein concerned, may shew cause against the issuing or granting of the said *certiorari*.

A party was convicted of assault before three Justices, and sentenced to pay a fine and costs. He appealed to the Sessions, and the conviction was affirmed. He then obtained a *certiorari*, addressed to the Chairman of the Sessions, to remove the conviction affirmed by the Sessions. The caption of the order made by the Sessions, affirming the conviction of the defendant, stated it to have been made by the Chairman, and J. K. and W. G., Justices. On the *ex parte* application for the *certiorari*, the only notices, filed by the defendant, were notices served on the three convicting Justices. No notice was served on the Chairman of the Sessions, or any two of his associates. It was held, on a rule to quash the *certiorari*, that the notice required by the Statute should have been given to the Chairman of the Sessions, and his associates or any two of them, as required by the Statute, and the *certiorari* being obtained without such notice was set aside. (a) The notice should be given to the Justices actually present, when the order of Sessions is made. It has been held that, where a rule *nisi* for a *certiorari* has been first taken out, and served on the Justices, and a rule absolute obtained for issuing the writ, that such a proceeding is not notice to the Justices, and, in such a case, the Court have quashed the *certiorari* upon motion to do so. (b)

Notice of application for a writ of *certiorari* must be given to the convicting Justice, and the want of such notice is good cause to be shewn to a rule *nisi*, to quash the conviction. (c)

(a) *Reg. v. Ellis*, 25 U. C. Q. B. 324.

(b) *Ib.* 326, per *Morrison*, J. ; *Rex v. Nicholls*, 5 T. R. 281 n. ; *Rex v. Battislaw*, 5 Dowl. P. C. 539.

(c) *Reg. v. Peterman*, 23 U. C. Q. B. 516.

In *Ellis'* case, notice was given to the convicting Justices, but not to the Chairman of the Sessions, or his associates; and, in *Peterman's* case, notice was given to the Chairman of the Sessions, but not to the convicting Justice. It would seem therefore that notice to both parties is necessary. In a notice, under the Statute, of application for a *certiorari* to remove a conviction, the grounds of objection to such conviction need not be stated. (a)

No notice is necessary, when the application is made by the private prosecutor, and not by the defendant, and the writ in such case issues of course, and without assigning any grounds. (b)

The cases before referred to (c) apply only, when the writ is obtained by the *defendant* with the view of quashing the conviction. (d)

An application to a Judge, in Chambers, for a *certiorari*, should be by a summons or rule *nisi*, in the first instance. (e)

Where a rule *nisi*, for a *certiorari*, is discharged, because the affidavits are improperly entitled, the application may be renewed on amended affidavits. (f)

Where a *certiorari* is applied for, to remove a conviction with a view to quashing it, before the return to the writ is filed, affidavits and rules should not be entitled in the cause, for, until the return is filed, there is no cause in Court. So soon as the return to the *certiorari* has been filed, the cause is in Court, and the motion paper and rule *nisi* must be entitled in the cause. Where the rule was not so entitled it was discharged; but, being on a tech-

(a) *Re Taylor v. Davy*, 1 U. C. P. R. 346.

(b) *Reg. v. Murray*, 27 U. C. Q. B. 134.

(c) *Reg. v. Ellis*, 25 U. C. Q. B. 324; *Reg. v. Peterman*, 23 U. C. Q. B. 516.

(d) *Reg. v. Murray*, *supra*.

(e) *Ex parte Howell*, 1 Allen, 584.

(f) *Ex parte Bustin*, 2 Allen, 211.

nical objection, without costs, and, under the circumstances of the case, an amendment was not allowed. (a)

Where a rule *nisi* was obtained, to shew cause why a *certiorari* should not issue to quash a conviction, it was held that the rule was properly entitled "In the matter of T. B.," and that it need not state into which Court the conviction was to be removed, for this was sufficiently shewn by entitling it in the Court in which the motion was made. After the rule *nisi* for the *certiorari* is made absolute, affidavits, etc., should be entitled "The Queen against A. B.," etc., but, before, they are properly entitled "In the matter of A. B." (b)

On applications to quash convictions, the convicting Justice must be made a party to the rule. (c)

The writ of *certiorari*, issuing under the provisions of the 12 Vic., c. 41, must be addressed to the Justice of the Peace making the conviction, and not to the bailiff effecting the service of such writ, and such writ of *certiorari* addressed to the bailiff is a nullity, and will be superseded. (d) So a writ of *certiorari*, addressed to the superintendent of police, and which ought to have been addressed to the Judge of the Sessions of the Peace, according to the provisions of the 25 Vic., c. 13, s. 1, will be set aside. Another writ will not be awarded, on motion to that effect, to rectify the error in the address of the first writ. (e)

Under the 12 Vic., c. 41, the original writ, and not a copy, must be served on the convicting Justice; but it is not necessary to serve a copy of the writ upon the complainant. (f)

(a) *Reg. v. Morston*, 27 U. C. Q. B. 132.

(b) *Re Barrett*, 28 U. C. Q. B. 559.

(c) *Reg. v. Law*, 27 U. C. Q. B. 260.

(d) *Reg. v. Barbeau*, 1 L. C. R. 320.

(e) *Piton and Lemoine*, 16 L. C. R. 316.

(f) *Ex parte Filiau*, 4 L. C. R. 129.

A writ of *certiorari* will be quashed where a copy only of the writ has been served on the convicting Justice, and his return made thereon. (a)

Where a conviction had been brought up by *Habeas Corpus* and *certiorari*, under the 29 & 30 Vic., c. 45, when, by the provisions of the 32 & 33 Vic., c. 31, no such writ could issue, it was held that it could not be quashed, but the Court could only discharge the defendant. (b)

The conviction being in Court, however, brought up, the Court might be obliged to consider it as upon a *certiorari*, issued at the common law, so long as it was regularly in Court. (c)

The 71st section of the 32 & 33 Vic., c. 21, as amended by the 33 Vic., c. 27, does not prevent the removal of the conviction by *certiorari*. (d)

The defendant cannot, by motion, compel a petitioner for *certiorari* to proceed upon such writ, but the proper course for the defendant is to issue a *procedendo*. (e)

A judgment of the Superior Court, rendered on a writ of *certiorari*, is a final judgment, (f) and, under the circumstances, in this case, it was held that no appeal lay from such judgment to the Court of Queen's Bench, as constituted in Quebec. (g) It seems that no appeal will lie from a judgment rendered on a writ of *certiorari*. (h)

The return of the notice of motion for a writ of *certiorari* may be made by a bailiff; but, if under his oath of office, it is insufficient. Such return must be proved upon oath, as required by the 13 Geo. 2, c. 18, s. 5. (i)

(a) *Ex parte Lahayes*, 6 L. C. R. 486.

(b) *Reg. v. Levecque*, 30 U. C. Q. B. 509.

(c) *Ib.* 513, per *Wilson*, J.; *Reg. v. Hellier*, 17 Q. B. 229; *Reg. v. Hyde*, 16 Jur. 337.

(d) *Reg. v. Levecque*, *supra*, 512, per *Wilson*, J.

(e) *Ex parte Morisset*, 2 L. C. R. 302.

(f) *Boston and Lelievre*, 14 L. C. R. 457.

(g) *Ib.*

(h) *Bazin and Crevier*, Rob. Dig. 28.

(i) *Ex parte Adams*, 10 L. C. J. 176, overruling *ex parte Roy*, 7 L. C. J. 109.



A Justice has no right to refuse to make a return to a writ of *certiorari*, because the fees due in such case have not been paid, but a rule *nisi*, for an attachment, will not be issued *de plano* without previous notice to the Justice. (a)

A motion to compel a Justice to return the original papers, under a writ of *certiorari*, will be granted without costs against the Justice. (b) But, in one case, such motion was granted with costs. (c)

Full faith and credit will be given to a Justice's or officer's return to a writ of *certiorari*, and, if the return shew that the conviction was had upon the confession of the defendant, the latter will not be permitted to go behind the return, and shew, by affidavits of parties, that he made no confession, and that the return is false, and that the conviction was really had without any proper confession whatever. (d)

It would seem that, if material evidence, given before a Justice, is omitted from the return to a *certiorari*, because he neglected to note it when given, either unintentionally or because he thought it, at the time, to have no particular bearing on the case, he might be allowed to amend his return by setting it out as part of the written evidence, if he remembered what it was, and if both parties concurred in the correctness of the addition; but, after the evidence has been returned, the Justice could be allowed to amend the notes from his own recollection, only with the concurrence of the witness, if he had signed the deposition. Though particular evidence may have been given before the Justice, the Judge cannot, on the return to the *certiorari*, act upon such evidence, if it is not re-

(a) *Ex parte Davies*, 3 L. C. R. 60.

(b) *Ex parte Demers*, 7 L. C. R. 428.

(c) *Ex parte Terrien*, 7 L. C. R. 429.

(d) *Ex parte Morrison*, 13 L. C. J. 295.

turned with the *certiorari*, and there is no affidavit stating that such evidence was given.

Evidence given before the Justice, but not returned in obedience to the *certiorari*, cannot be supplied by affidavits. (a)

Where a *certiorari* simply requires a return of the evidence, the Justice need not return the conviction, or a copy of it. (b) If the Justice should have returned the conviction, but had not done so, he would be allowed an opportunity to do so, and amend his return. If he had already returned the conviction to the Clerk of the Peace, he might shew that fact, or he might transmit a copy of it instead, stating why he could not return the original. (c) If the Justice did not truly return the proceedings, he would be liable for making a false return. (d) A return of affidavit and warrant only is insufficient. (e)

A party appearing to support a conviction cannot object to the cause being proceeded with, because the Justice's return to the *certiorari* is not under seal. (f)

In a case where, owing to a mistake in the Crown Office, a rule to return a writ of *certiorari*, and afterwards a rule for an attachment issued, although a return had, in fact, been filed—more than six months having thus expired since the conviction—the Court were asked to allow process to issue against the Justice for the illegal conviction, as of a previous term, but the application was refused. (g)

Where a rule *nisi* for a *certiorari*, to remove a conviction,

(a) *Reg. v. M'Naney*, 7 C. L. J. N. S. 325-6, per *Wilson*, J. ; 5 U. C. P. R. 438.

(b) *Ib.* 325.

(c) *Ib.* 326, per *Wilson*, J.

(d) *Ib.* 326, per *Wilson*, J.

(e) *Rex v. Desgagne*, Rob. Dig. 73.

(f) *Reg. v. Oulton*, 1 Allen, 269.

(g) *Re Joice*, 19 U. C. Q. B. 197.

is discharged, the successful party is not entitled to the costs of opposing the rule. (a)

Where an objection is taken that there is some irregularity in obtaining the allowance of a *certiorari*, or in the issue of the writ itself, if moved against as a substantive matter, the Court might give an opportunity to amend; but if urged against the quashing of a bad conviction, no such opportunity is afforded. (b)

In shewing cause to a rule *nisi* to quash a conviction, it was objected that the recognizance roll was irregular, being dated in the 32nd year of the reign of Her Majesty, while the conviction was in the 33rd; but held that this was only ground for a motion to quash the *certiorari*, or the allowance of it, and that it could not be shewn as a defect against quashing a bad conviction, and, *semble*, the objection to the recognizance could not be taken at that stage of the proceedings. (c)

The exercise of jurisdiction, in each of the Circuit Courts of New Brunswick, is not entirely confined to one particular Judge, so as to exclude any other Judge from sitting and holding the Court, should occasion require; but the Court, on every day on which it sits, is to be holden before some one of the Judges of the Supreme Court. (d)

Where a Circuit Court is adjourned to a future day, in consequence of unfinished civil business, the criminal jurisdiction of the adjourned Court is not confined to the trial of offences committed before the adjournment, or of indictments previously found. (e)

(a) *Ex parte Daley*, 1 Allen, 435. See as to costs, *Reg. v. Ipstones*, L. R. 3 Q. B. 216.

(b) *Reg. v. Hoggard*, 30 U. C. Q. B. 156-7, per *Richards*, C. J.

(c) *Ib.* 152.

(d) *Reg. v. Dennis*, 3 Allen, 425. per *Carter*, C. J.

(e) *Ib.* 423.

County Courts have no jurisdiction in penal actions, unless it is expressly given them by Statute. (a)

County Courts have jurisdiction, under Con. Stats. U. C., c. 124, s. 2, to try an action for a penalty against a Justice of the Peace, where the penalty claimed does not exceed \$80. (b)

The Court of Quarter Sessions does not possess any greater powers than are conferred on it by Statute. It has, however, jurisdiction over offences attended with a breach of the peace. But forgery and perjury, not being attended with a breach of the peace, are not triable at the Sessions. (c)

Under 32 & 33 Vic., c. 20, s. 48, the Sessions of the Peace cannot try the offences specified in sections 27, 28, and 29 of that Act. A similar provision is made by c. 21, s. 92, as to certain offences under it. By c. 29 of the same year, s. 12, no Court of General or Quarter Sessions, or Recorder's Court, nor any Court but a Superior Court, having criminal jurisdiction, shall have power to try any treason, or any felony punishable with death, or any libel. The exceptions contained in the last three named Statutes, and the excepted cases of forgery and perjury, define, as nearly as may be, what the general jurisdiction of the Sessions of the Peace is. The unexcepted offences they may try. (d)

As the Court of Quarter Sessions has no jurisdiction in perjury, a recognizance to appear for trial on such a charge at the Sessions is wrong; but a *certiorari* to re-

(a) *O'Reilly q. t. v. Allan*, 11 U. C. Q. B. 526.

(b) *Brash q. t. v. Taggart*, 16 U. C. C. P. 415.

(c) *Reg. v. M'Donald*, 31 U. C. Q. B. 337-9; *Reg. v. Yarrington*, 1 Salk. 406; *Rex v. Haynes*, R. & M. 298; *Rex v. Higgins*, 2 Ea. 5; *Butt v. Conant*, 1 B. & B. 548; *ex parte Bartlett*, 7 Jur. 649; *Reg. v. Dunlop*, 15 U. C. Q. B. 118; *Reg. v. Currie*, 31 U. C. Q. B. 582.

(d) *Reg. v. M'Donald*, *supra*, 339, per Wilson, J.

move it will be refused, if the time for the appearance of the party has gone by. (a)

The Quarter Sessions is a Court of *Oyer and Terminer*, and a *venire de novo* may be awarded to it by the Queen's Bench. (b)

If an order of Justices, in Sessions, be defective in one part, it may be quashed as to that, and confirmed as to the rest, if the different parts can be separated. (c)

Defendant was convicted of an assault at the Quarter Sessions, and fined; but, during the same Sessions, and on the second day after the sentence was pronounced, on filing an affidavit of his own, he obtained a new trial, and was acquitted at the following Sessions. It was not shewn that the Sessions had granted a new trial, solely on the affidavit of the defendant:—*Held*, that the Sessions might grant a new trial, though there had been a judgment, and sentence pronounced at the same Sessions, and that the Superior Court had no authority to review the judgment of the Sessions, in ordering a new trial. (d)

The Court of Quarter Sessions has a general power to adjourn, unless an Act of Parliament plainly intimates an intention that they should not have such power. (e) The power of adjournment of any matter of which the Court of Sessions may be seized is inherent in the Court, and such adjournment need not be to the next, but may be to any future, Court. Nor need there be a formal adjournment, if some proceeding is adopted by the Court which, virtually, amounts to an adjournment. (f)

Where a Statute enables two Justices to do an act, the Justices, sitting in Quarter Sessions, may do the same

(a) *Reg. v. Currie*, 31 U. C. Q. B. 582.

(b) *Reg. v. M'Donald*, 31 U. C. Q. B. 338, per *Wilson, J.*; *Campbell v. Reg.* 11 Q. B. 799-814.

(c) *Reg. v. Simpson*, 1 Hannay, 32.

(d) *Reg. v. Fitzgerald*, 20 U. C. Q. B. 546.

(e) See *Reg. v. Murray*, 27 U. C. Q. B. 134.

(f) *Reg. v. Justices, Westmoreland*, L. R. 3 Q. B. 457.

act; for they are not the less Justices of the Peace, because they are sitting in Court in that capacity. (a)

It would seem that the Chairman of the Quarter Sessions cannot make any order of the Court, except during the Sessions, either regular or adjourned. (b)

The Sessions possess the same powers as the Superior Courts as to altering their judgments during the same Sessions, or term; and, for that purpose, the Sessions, as the term, is all looked upon as one day. (c)

In this case, it was held that the Sessions might grant a new trial at the same sittings or sessions at which the conviction took place.

On the first day of the Sessions, the appellant's counsel called on and proved his case. The respondent did not appear. It was not known that he had employed counsel, and the Court ordered the conviction to be quashed. On the second day, counsel appeared, and stated he had been employed, and was taken by surprise, and explained the reason of his non-appearance, on the first day, to the satisfaction of the Court and the appellant's counsel, and applied to have the order of the Court, quashing the conviction, discharged. The Chairman intimated that the application must not be understood in the nature of a new trial, and that, if a jury had decided the case, the authority of the Sessions to disturb the verdict might be doubted; but *held*, on the authority of *Holborn v. Danes*, (d) that the Court had power to revoke the order quashing the conviction, for they could alter their judgment at any time during the same Session. (e)

It seems that the fact of a Bench warrant having no

(a) *Fraser v. Dickson*, 5 U. C. Q. B. 233, per *Robinson*, C. J.

(b) *Re Coleman*, 23 U. C. Q. B. 615.

(c) *Reg. v. Fitzgerald*, 20 U. C. Q. B. 546, per *Robinson*, C. J.

(d) 2 Salk. 494-606.

(e) *M'Lean and M'Lean*, 9 U. C. L. J. 217.

seal does not make it invalid (*a*), and a warrant of commitment, under the seal of the Court, or signature of the chairman, is not necessary. (*b*)

An attorney-at-law has no right to act as an advocate in a Court of Quarter Sessions, (*c*) and it is not in the power of County Court Judges to allow attorneys who are not barristers, to practise before them, as advocates in County Courts. (*d*)

It seems that the Judges of every Court have power to regulate its proceedings, as to who shall be admitted to act as advocates, and that there is no positive rule of law to prevent any Court of justice from allowing the attorney, even of a private individual, from acting as an advocate. (*e*) But it would seem that these remarks can only hold when there is no Statute excluding the person permitted to act. (*f*)

The 32 & 33 Vic., c. 30, s. 35, gives Justices power to proceed in private, and thereby to prevent counsel, attorney, or any other person, from appearing in behalf of the accused. (*g*) But, under c. 31 of the same year, ss. 29 and 30, counsel have a right to be heard.

Defendant having been convicted, at the Quarter Sessions, in June, 1863, judgment was reserved, and a special case stated for the opinion of the Court of Common Pleas. The questions thus reserved not having been heard or disposed of, the case was duly adjourned, from time to time, and was again brought up at the Sessions in March, 1864, upon motion for judgment, on the part of the prosecution, and a rule *nisi* granted for a new trial in the fourth sittings of the Sessions after conviction. The rule

(*a*) *Fraser v. Dickson*, 5 U. C. Q. B. 234, per *Robinson*, C. J.

(*b*) *Ovens v. Taylor*, 19 U. C. C. P. 49.

(*c*) *Reg. v. Erridge*, 3 U. C. L. J. 32.

(*d*) *Re Brooke*, 10 U. C. L. J. 49. See also *Re Lapenotiere*, 4 U. C. Q. B. 492.

(*e*) *Reg. v. Carter*, 15 L. C. R. 295-6, per *Meredith*, J.

(*f*) See *Re Judge*, C. C. York, 31 U. C. Q. B. 267.

(*g*) See *ib.* 271.

*nisi* was afterwards discharged. The defendant appealed from that decision:—*Held*, that, as before the rule *nisi* was granted, a case was stated under the Con. Stats. U. C., c. 112, s. 2, which had not been heard or disposed of, and, as the third section of the Act provides that the Superior Court shall, in such case, hear, and finally determine, the questions stated, the Court of Sessions were no longer in possession of the matter, either to pass sentence or to grant a new trial; that there was nothing legally before this Court, and that it could not be called on to review the decision of the Court of Sessions. (a)

The power of fining and imprisoning, necessary to constitute a Court of Record, must be a general power, and a limited power of fining and imprisoning, such as the power to impose a specific pecuniary penalty and a certain number of days' imprisonment, does not constitute a Court of Record. (b)

A Court of Quarter Sessions, being a Court of Record, has jurisdiction to fine for contempt of Court; and a counsel was fined for using insulting language to a jurymen, and thereby obstructing the business of the Court. The Court of Queen's Bench will exercise a supervision in such cases, and see that the inferior Court has not exceeded its jurisdiction. (c)

Where an indictment will lie for a misdemeanor, an information may also be sustained. (d)

Formerly any person might file a criminal information in the Queen's Bench, for a misdemeanor, against any other, and such informations were frequently resorted to, as a means of extorting money. (e) The abuse was effectually put a stop to by the 4 & 5 W. & M., c. 18, which

(a) *Reg. v. Boulton*, 23 U. C. Q. B. 457.

(b) *Young v. Woodcock*, 3 Kerr, 554.

(c) *Re Pater*, 5 B. & S. 299; 10 Jur. N. S. 972.

(d) *Reg. v. Mercer*, 17 U. C. Q. B. 630-1, per Burns, J.

(e) Arch. Cr. Prac. 17.



enacts "The Clerk of the Crown, in the King's Bench, shall not, without express orders given by the Court in open Court, receive or file any information for a misdemeanor before he shall have taken, or shall have delivered to him, a recognizance, from the person procuring such information, to be exhibited in the penalty of £20, conditioned to prosecute such information with effect."

The remedy, by criminal information, obtains in Quebec, and the duties and powers of the Clerk of the Crown, in such cases, are analogous to those of the Master of the Crown Office, or Clerk of the Crown in England. (a)

A party, applying for a criminal information, must declare that he waives all other remedies, whether by civil action or otherwise. (b)

It is an established rule, that no application for a criminal information can be made against a Justice, for anything done in execution of his office, without previous notice. (c)

The Justice is entitled to six days' notice of the motion; and the motion must be made in time to enable the party accused to answer the same term. (d)

Where the motion was made after two terms had been suffered to pass, and after a Court of *Oyer and Terminer* had been held in the District, it was refused. (e)

A motion for a rule for a criminal information, once discharged for irregularity or insufficiency of proof, cannot be renewed by amending the irregularity or supplying the deficiency of proof.

The person, in whose behalf the application is made,

(a) *Ex parte Gagy*, 9 L. C. R. 51.

(b) *Ib.* See also *R. v. Sparrow*, 2 T. R. 198; *Wakley v. Cooke*, 16 M. & W. 822.

(c) *R. v. Heming*, 5 B. & Ad. 666.

(d) *Reg. v. Heustis*, 1 James, 101; *Re Complaint Bustard v. Schofield*, 4 U. C. Q. B. O. S. 11.

(e) *Ib.*

cannot move the rule in person. (a) The motion must be made by a barrister or counsel. (b)

To support a motion for leave to file a criminal information against a Justice of the Peace, the affidavits should not be entitled in a suit pending. (c)

A criminal information must be signed by the Clerk of the Crown or Master of the Crown Office. (d)

An information in the name of the Attorney-General will be dismissed with costs, on an exception *à la forme*, it being signed by certain attorneys styling themselves "procureurs du Procureur Général," inasmuch as the Attorney-General, when appearing for Her Majesty, cannot act by attorney. (e)

A criminal information by the Attorney-General of New South Wales, against a member of the Legislative Assembly of that colony, for an assault on a member, committed within the precincts of the House, while the Assembly was sitting, in addition to charging the assault in fit and apt terms, averred that such assault was "in contempt of the said Assembly, in violation of its dignity, and to the great obstruction of its business":—*Held*, on demurrer, that the information was good, as the alleged contempt of the Legislative Assembly was the statement of a consequence resulting from the assault; and whether that consequence did or did not result from the assault, or whether it was a mere aggravation of the assault, was immaterial. The words did not alter the character, or the allegations with regard to the character, of the offence charged, and, if surplusage, they might be rejected. (f)

(a) *Ex parte Gugg*, 9 L. C. R. 51.

(b) 1 Chit. Rep. 602.

(c) *Re Complaint Bustard v. Schofield*, 4 U. C. Q. B. O. S. 11; *R. v. Harrison*, 6 T. R. 60.

(d) *Reg. v. Crooks*, 5 U. C. Q. B. O. S. 733.

(e) *Atty. Genl. v. Laviolette*, 6 L. C. J. 309.

(f) *Atty. Genl. v. Macpherson*, L. R. 3 P. C. App. 268.

A criminal information, being the mere allegation of the officer who files it, may be amended. (a)

In an information for intrusion, the venue may be laid in any District, without regard to the local situation of the premises. (b)

Where there is no proof that the defendant has been out of possession for twenty years, the defendant cannot, under a plea of not guilty to an information of intrusion, give evidence of title, under a Crown lease. (c)

On applications for criminal informations, the Court is in the position of a Grand Jury, and requires the same amount of evidence as would warrant a Grand Jury in finding a true bill. (d)

A rule *nisi* for a criminal information for libel having been obtained against J. S., on affidavits which stated that a copy of a newspaper had been purchased from a salesman in the office of the newspaper, and that, by a foot note to the newspaper, J. S. was stated to be the printer and publisher of the newspaper, and that the deponent believed J. S. to be the printer and publisher, the Court discharged the rule on the ground that the affidavit contained no legal evidence of publication, holding that such evidence was necessary, and that an affidavit on information and belief was not legal evidence. *Semble*, a defect in the affidavits, on which the rule *nisi* for a criminal information has been obtained, can be supplied by a statement in an affidavit of the defendant, made in shewing cause against the rule. (e) The affidavit, upon which the application is made, must disclose all the material facts of the case, and, if a material fact be suppressed or

(a) *Re Conklin*, 31 U. C. Q. B. 167, per *Wilson*, J.

(b) *Atty. Genl. v. Dockstader*, 5 U. C. Q. B. O. S. 341.

(c) *Reg. v. Sinnott*, 27 U. C. Q. B. 539.

(d) *Ex parte Gugg*, 9 L. C. R. 51.

(e) *Reg. v. Stanger*, L. R. 6 Q. B. 352.

misrepresented, the Court will discharge the rule, very probably with costs. (a)

The reason why parties are committed to prison by Justices, before trial, is for the purpose of ensuring or making certain their appearance to take their trial, and the same principle is to be adopted on an application for bail. It is not a question as to the guilt or innocence of the prisoner. On this account, it is necessary to see whether the offence is serious and severely punishable, and whether the evidence is clear and conclusive. (b)

Where the charge against a prisoner is that he procured a person to set fire to his house, with intent to defraud an Insurance Company, and it is shewn that the prisoner attempted to bribe the constable to allow him to escape, the probability of his appearing to stand his trial is too slight for the Judge to order bail. (c)

The principle, upon which a party committed to take his trial for an offence may be bailed, is founded chiefly upon the legal probability of his appearing to take his trial. Such probability does not exist, in contemplation of law, when a crime is of the highest magnitude, the evidence, in support of the charge, strong, and the punishment the severest known to the law. (d)

On an application by prisoners in custody, on a charge of murder under a coroner's warrant, it is proper to consider the probability of their forfeiting their bail, if they know themselves to be guilty, and where, in such a case, there is such a presumption of the guilt of the prisoners as would warrant a Grand Jury in finding a true bill, they should not be admitted to bail. (e)

(a) *R. v. Willett*, 6 T. R. 294; *R. v. Williamson*, 3 B. & Ald. 582; Arch. Cr. Pldg. 113.

(b) *Reg. v. Brynes*, 8 U. C. L. J. 76; *Reg. v. Scaife*, 9 Dowl. P. C. 553.

(c) *Ib.*

(d) *Ex parte Maguire*, 7 L. C. R. 59.

(e) *Reg. v. Mullady*, 4 U. C. P. R. 314.

Where a person charged with murder applies for bail, the Judge will look to the gravity of the offence, the weight of evidence and the severity of the punishment, and may refuse bail. (a)

A prisoner, confined upon a charge of arson, may be admitted to bail, after a bill found by a Grand Jury, if the depositions against him are found to create but a very slight suspicion of his guilt. (b) A prisoner, in custody for larceny, may be admitted to bail, when the evidence discloses very slight grounds for suspicion. (c)

So a prisoner charged with murder may, in some cases, in the exercise of a sound discretion, be admitted to bail. On a application for bail, the Court may look into the information, and, if they find good ground for a charge of felony, may remedy a defect in the commitment, by charging a felony in it, so that the prisoner would not be entitled to bail on the ground of the defective commitment. (d) A person charged with having murdered his wife, in Ireland, will not be admitted to bail until a year has elapsed from the time of the first imprisonment, although no proceedings have, in the meantime, been taken by the Crown, and no answer has been received to a communication from the Provincial to the Home Government on the subject. (e)

A prisoner charged with felony may be released on bail, if it is satisfactorily established that, unless liberated, he will, in all probability, not live until the time fixed for his trial. (f)

Prisoners charged with murder cannot be admitted to bail, unless it be under very extreme circumstances, as

(a) *Ex parte Corriveau*, 6 L. C. R. 249.

(b) *Ex parte Maguire*, 7 L. C. R. 57.

(c) *Rex v. Jones*, 4 U. C. Q. B. O. S. 18.

(d) *Rex v. Higgins*, 4 U. C. Q. B. O. S. 83.

(e) *Rex v. Fitzgerald*, 3 U. C. Q. B. O. S. 300.

(f) *Ex parte Blossom*, 10 L. C. J. 71, per *Meredith*, J.

where facts are brought before the Court, to shew that the bill cannot be sustained. The fact that prisoners indicted for wilful murder cannot be tried until the next term, is no ground for admitting them to bail. (a) Accessories after the fact, who have, merely, harboured prisoners guilty of murder, may be admitted to bail. (b)

The Con. Stats. L. C., c. 95, excepts persons committed for treason or felony, as well as persons convicted or in execution by legal process, who are not entitled to bail in term or vacation. (c)

The Court may order bail in a case of perjury. (d) By the words of the Con. Stats, L. C., c. 95, it is obligatory upon the Judge in a case of misdemeanor to admit to bail. (e)

All misdemeanors, whether common or otherwise, are bailable. Under the 32 & 33 Vic., c. 30, it is obligatory upon Justices of the Peace to admit to bail in all cases of misdemeanors. The Statute is equally binding upon the Judges of the Superior Courts. (f)

The word "shall," in s. 56 of this Statute, is imperative. (g)

Several persons were accused of a misdemeanor, and, in the opinion of the Judge presiding, the evidence adduced was positive against them. Two juries had been discharged, because they could not agree upon a verdict. The Court ordered them to be committed to gaol, without bail or mainprize, to be tried again at the next term, and not to be discharged without further order from the Court. (h)

(a) *Reg. v. Murphy*, 1 James, 158.

(b) *Ib.*

(c) *Ex parte Blossom*, 10 L. C. J. 43, per *Badgley*, J.

(d) *Reg. v. Johnson*, 8 L. C. J. 285.

(e) *Ex parte Blossom. supra*, 31, per *Monk*, J.

(f) *Ex parte Blossom*, 10 L. C. J. 73, per *Meredith*, J.

(g) *Ib.* 35, 67-8.

(h) *Reg. v. Blossom*, 10 L. C. J. 29.

In the above case, the prisoners were indicted for conspiring to kidnap one G. N. S., and steal and carry him away into the United States. The Grand Jury found a true bill against them, for misdemeanor. The prisoners pleaded not guilty, and were arraigned for trial on the 29th September, 1865. The jury, after three days' deliberation, being unable to agree, were discharged. On the 17th of October following, the said prisoners were again put upon trial, on the same indictment, before another jury. This jury also disagreed, and, after nine days' deliberation, were also discharged :—*Held*, that, under these circumstances, the prisoners were entitled to bail, by virtue of the Con. Stats. L. C., c. 95; that a prisoner is entitled to bail for misdemeanor, not only before but after indictment found against him, and that the fact of two successive juries having disagreed rendered the right of the prisoners to bail unquestionable. (a)

Where prisoners have been twice tried for misdemeanors, and the juries on both trials discharged because of disagreement, an order of the Court of Queen's Bench, Crown side, that the prisoners be committed to gaol without bail, or mainprize to stand their trial at the next term, and not to be discharged without further order from the said Court is void, for the Con. Stats. L. C., c. 95, s. 4, ss. 3, is restrictive of the power to bail, only when the prisoner is detained under an order for some offence, for which, by law, the prisoner is not bailable, and, in this case, the offence being a misdemeanor, was clearly bailable. Such order, therefore, will be no bar to the granting of bail by any competent Court or Judge. (b)

The word "may," in the 32 & 33 Vic., c. 30, s. 52, must be considered as conferring a power, and not as giving a

(a) *Ex parte Blossom*, 10 L. C. J. 30.  
(b) *Ib.* 35-46.

discretion. The object of the Act is to declare that one Justice cannot bail in felony, but may in misdemeanor. (a)

Although a Statute may require the presence of three persons to convict of an offence, yet one has power to bail the offender in all cases of misdemeanor, by the common law, unless prevented by some Statute. (b)

Where two juries have disagreed and been discharged, on the trial of a person for misdemeanor, the law, from these circumstances, raises such a presumption of innocence as to entitle him to his discharge on bail. (c)

Where the prisoners were convicted at the Sessions, on an indictment for felony, and a case reserved for the opinion of the Queen's Bench, which had not been argued, a Judge, in Chambers, refused to bail, except with the consent of the Attorney-General, (d) for the Con. Stats. U. C., c. 112, vests the discretion to bail, upon a case reserved, in the Court which tried the prisoners. (e)

The fact of one Assize having passed over since the committal of the prisoners, without an indictment having been preferred, is, in itself, no ground for admitting them to bail; and it can have no other influence than to induce a somewhat closer examination of the evidence on which the prisoner is committed. Where the prisoner does not bring himself within the 31 Car. 2, c. 2, s. 7, by praying, on the first day of the Assizes, to be brought to trial, as the Crown is not, therefore, bound to indict him at that court, the granting of bail is discretionary, and cannot be claimed as a right. (f)

After the accused has pleaded not guilty to an indictment, no default can be recorded against him without

(a) *Ex parte Blossom*, 10 L. C. J. 67, per *Meredith*, J.

(b) *King v. Orr*, 5 U. C. Q. B. O. S. 724.

(c) *Ex parte Blossom*, 10 L. C. J. 45, per *Badgley*, J.

(d) *Reg. v. Sage*, 2 U. C. P. R. 138.

(e) *Ib.* 139, per *Robinson*, C. J.

(f) *Reg. v. Mullady*, 4 U. C. P. R. 314.



notice, unless it be on a day appointed for his appearance. (a)

Where a party accused of perjury has been arraigned and pleaded not guilty, and no day certain has been fixed for the trial, and no forfeiture of his bail has been declared, the mere failure of the party, when called upon to answer in the term subsequent to that in which he was arraigned, cannot operate as a forfeiture of such bail. (b)

If an offence is bailable, and the party, at the time of his apprehension, is unable to obtain immediate sureties, he may, at any time, on producing proper persons as sureties, be liberated from confinement. (c)

A person, accused of theft, had given a recognizance of bail, but after the finding of the indictment against him, by the Grand Jury, and before trial, had absconded. A rule *nisi*, to enter up judgment on the recognizance, was obtained, on an affidavit of the Clerk of the Crown, of the fact of a recognizance having been entered into by the defendant, of the signature of the Justices of the Peace thereto, and its return into the Supreme Court, and the non-appearance of the party to plead to the indictment. A copy of this rule, together with a copy of the affidavit, was served on each of the defendants:—*Held*, that the rule *nisi* was proper, instead of a proceeding by *scire facias*, and that such judgment might be properly entered on an affidavit of the service of the rule *nisi* therefor on the bail, and their failing to shew cause. (d)

Where bail entered into a recognizance, conditioned for the appearance of their principal to answer a charge

(a) *Reg. v. Croteau*, 9 L. C. R. 67.

(b) *Atty. Genl. v. Beaulieu*, 3 L. C. J. 117.

(c) *Ex parte Blossom*, 10 L. C. J. 68, per *Meredith*, J.

(d) *Reg. v. Thompson*, 2 Thomson, 9; affirmed by *Reg. v. Cudihy*, 1 Oldright, 701.

of assault with intent to commit rape, and the only bill found against the accused was for the more serious offence of rape, and his recognizance was estreated for his non appearance to answer that charge, a rule *nisi* was made absolute for their relief from the estreated recognizance, for they did not become bail for the appearance of the accused, to answer a charge of rape, and, therefore, his non-appearance to answer that charge was no breach of the recognizance. (a)

In an ordinary recognizance of bail, on an indictable charge, the accused is not bound to appear unless a bill be found against him. Where, therefore, the accused was called, though the Grand Jury had not, owing to absence of witnesses, an opportunity of finding a bill, and the recognizance was estreated, a rule was made absolute for the relief of the bail. (b)

Defendant, having entered into a recognizance to appear at a certain Assizes, attended until the last day, when he left, assuming, as no indictment had been found, that the charge against him of a breach of the Foreign Enlistment Act was not intended to be prosecuted. He was, however, called, and his recognizance estreated. The Court, under the circumstances, relieved him and his sureties, under the Con. Stats, U. C., c. 117, s. 11, on payment of costs, and on his entering into a new recognizance to appear at the following Assizes. (c)

It is no ground for discharging the estreat of a recognizance of bail that the accused did not receive from the Justice, who took the recognizance, the notice directed to be given by the 7 Wm. 4, c. 10, s. 8. (d)

When a recognizance is entered into for the appear-

(a) *Reg. v. Wheeler*, 1 U. C. L. J. N. S. 272.

(b) *Reg. v. Ritchie*, 1 U. C. L. J. N. S. 272.

(c) *Reg. v. M'Leod*, 24 U. C. Q. B. 458.

(d) *Reg. v. Schram*, 2 U. C. Q. B. 91.

ance of the accused in the Court of Queen's Bench, it is the duty of the Judges of that Court to estreat the recognizance in the event of forfeiture. (a)

Where a prisoner charged with felony had been admitted to bail upon an order of a Judge in Chambers, and an application was subsequently made to rescind such order, and to recommit the prisoner to gaol, on the ground that he had not been committed for trial, at the time such order was granted, being in custody only under a warrant of remand, and also upon the ground that the bail put in was fictitious:—*Held*, that a Judge in Chambers had power to make the order asked for; that when bail are insufficient or fictitious better sureties may be ordered, and, the sureties in this case appearing to be fictitious, the order was conditional upon the failure of the prisoner to find new sureties within a specified time. (b)

An application for bail must be made upon affidavits entitled "In the Queen's Bench," verifying copies of the depositions. (c) The affidavits should be accompanied by a certified copy of the commitment. (d)

Where a prisoner makes application to a Judge in Chambers, to be admitted to bail to answer a charge for an indictable offence, under the 32 & 33 Vic. c. 30, s. 61, the copies of information, examination, etc., may be received, though certified by the County Crown Attorney and not by the committing Justice. Under ss. 38 and 58 of this Statute, the committing Magistrate has still power to certify copies of the information, examination and depositions close under his hand and seal. (e)

The institution of Grand Juries, if not carefully

(a) *Reg. v. Croteau*, 9 L. C. R. 67.

(b) *Reg. v. Mason*, 5 U. C. L. J. N. S. 205; 5 U. C. P. R. 125.

(c) *Reg. v. Barthelmy*, 1 E. & B. 8; Dears. 60.

(d) Arch. Cr. Pldg. 89.

(e) *Reg. v. Chamberlain*, 1 U. C. L. J. N. S. 157; *ib.* 142. See also Con. Stats. U. C. c. 106, s. 9.

guarded, is liable to abuse, as it furnishes facilities for fraud and oppression by giving an opportunity to a wicked person to go before a secret tribunal, and, without notice to the party accused, to get a bill of indictment found against him, which, whether true or false, may be used as an engine of extortion; further proceedings may be abandoned, if the prosecutor can be bribed so that Justice is defeated, if the defendant be guilty, or an infamous wrong may be inflicted upon him if innocent.—The 32 & 33 Vic., c. 29, s. 28, was passed with a view to suppress vexatious proceedings of this description.

It is not necessary that the performance of any of the conditions mentioned in this Statute should be averred in the indictment, or proved before the petty jury. (a)

When the indictment is preferred by the direction, or with the consent in writing, of a Judge of one of the Superior Courts, it is for the Judge, to whom the application is made for such direction or consent, to decide what materials ought to be brought before him, and it is not necessary to summon the party accused, or to bring him before the Judge. (b)

Where three persons were committed for conspiracy, and afterwards the Solicitor-General, acting under this Statute, directed a bill to be preferred against a fourth person who had not been committed, and all four were indicted together for the same conspiracy, such a course was held to be unobjectionable. (c)

It seems that, where, in a civil action, the jury find a party guilty of a crime, as where in an action on a policy of insurance against fire arson is set up in the plea, and the jury find the plaintiff guilty thereof, the plaintiff may

(a) *Knowlden v. Reg.*, 5 B. & S. 532; 33 L. J. (M. C.) 219.

(b) *Reg. v. Bray*, 3 B. & S. 255; 32 L. J. (M. C.) 11.

(c) *Knowlden v. Reg. supra*; Arch. Cr. Pldg. 5.

be tried on this finding for the criminal offence without the finding of the Grand Jury. (a)

The evidence offered to a Grand Jury is evidence of accusation only. It is to be given and heard in secret according to the oath administered. The accused has no right to appear before, or be heard by, the Grand Jury either for the purpose of examining his accuser or of offering exculpatory evidence.

Evidence before a Grand Jury can only be received, under the sanction of an oath, so that if any false statement be made, the person may be punished. The oath may be administered by the foreman; but it can only be administered, when the jury are assembled as such.

The law requires that twelve members should be present for the purpose of any enquiry, and twelve of them must assent to any accusation.

When a charge is presented to a Grand Jury, they should consider first whether the accused is capable of committing the crime, and this involves the criminal liability of infants, persons *non compotes mentis*, married women, etc.

A reasonable conclusion only is required, the rest is for the jury on the trial. They must have reasonable evidence of the *corpus delicti*, and that the accused is the guilty person. The intent laid or charged against the accused should clearly appear, either expressly or by necessary implication, from the circumstances. (b)

The record of a conviction for murder set out, in the caption, that the indictment was found at a general session of *Oyer and Terminer* and General Gaol Delivery, before the Chief Justice of the Common Pleas, duly assigned, and under, and by virtue of, the Statute, in that behalf

(a) *Richardson v. Can. W. F. Ins. Co.* 17 U. C. C. P. 343, per J. Wilson, J.  
( See Charge of Mr. Jus. Burns, 8 U. C. L. J. 6.

duly authorized and empowered to enquire, etc., setting out the authority to hear and determine, as formerly given in commissions, but not to deliver the gaol. It was then stated that, at the said session of *Oyer and Terminer* and General Gaol Delivery, the prisoner appeared and pleaded, and the award of *venire* was, "therefore let a jury thereupon immediately come," etc. This record was returned to a writ of error, directed, "To our Justices of *Oyer and Terminer*, for our County of C., assigned to deliver the gaol of the said county of the prisoners therein being, and also to hear and determine all felonies, etc." On error brought, it was held that the authority of the Justice sufficiently appeared without any statement whether a commission had issued, or been dispensed with by order of the Governor, for such Courts are now held not under commissions, but by virtue of the Statute, Con. Stat. U. C., c. 11, as amended by 29 & 30 Vic., c. 40, and, as the record sufficiently shewed the absence of any commission, it must be presumed that it seemed best to the Governor not to issue one. The record shewed the Court to be held by a person competent to hold it, either with or without a commission, and was, therefore, sufficient. (a) But it would seem that if the Court had been held by a Queen's Counsel, or County Court Judge, it might have been necessary to shew whether a commission had issued or not, because he would only have authority if named in the commission, or appointed by one of the Superior Court Judges.

It would seem, also, that, if the caption had been defective, it might have been rejected altogether, under Con. Stats. Can., c. 99, s. 52.

In the same case, it was objected that, the only authority shewn being that of *Oyer and Terminer*, the award

(a) *Whelan v. Reg.* 28 U. C. Q. B. 2.

“therefore let a jury thereupon immediately come” was unauthorized and a special award of *venire facias* was requisite:—*Held*, assuming, but not admitting, that in England there is a difference, in this respect, between the power of Justices of *Oyer and Terminer* and of Gaol Delivery, and that the record shewed no authority to deliver the gaol; that, in this country, by the Jury Act, Con. Stat. U. C., c. 31, both have the same powers, the general precept to summon a jury being issued by both before the Assizes. (a)

A Judge of Assize, as such, may, by force of the Statute, 27 Edw. 1, c. 3, deliver the gaol without any special commission for that purpose. (b)

The Court is bound to take judicial notice of the powers of a Court of General Gaol Delivery, and, wherever it is recited, on a record, that anything was done at such a Court, if it is found that such Court has power to do the thing recited, it must be held to be rightly done. (c)

As to serving on juries, infancy has been considered a ground of disqualification, on account of the probable deficiency of understanding. Being over the prescribed age has been considered only a ground for not returning the jurymen, and there is no known head of challenge under which the objection can be made to a jurymen over the prescribed age, if otherwise competent. The Statute, 13 Edw. 1, c. 38, being in the affirmative, leaves infants disqualified as at common law. (d)

This Statute enacts, in peremptory terms, that old men above the age of seventy years shall not be put upon juries. But the prohibition in the Statute was not intended as a disqualification, but merely as an exemption; for,

(a) *Whelan v. Reg.* 28 U. C. Q. B. 2.

(b) *Ib.* 44, per *A. Wilson, J.*

(c) *Ib.* 85, per *Richards, C. J.*

(d) *Mulcahy v. Reg.* L. R. 3 E. & I. App. 315, per *Willes, J.*

if they were put upon the panel, they could not be challenged. (a)

The 3 & 4 Wm. 4, c. 91 makes a clear distinction between disqualification and exemption. Where, therefore, a jurymen was returned whose age exceeded sixty years, that fact only operated in his favour, as an exemption, but was not a ground for challenge, as a personal disqualification. By this Statute, every one between the ages of twenty-one and sixty was qualified. By the Con. Stats. U. C., c. 31, s. 7, every person upwards of sixty years of age is absolutely freed and exempted from being returned, and from serving on juries, and shall not be inserted in the rolls to be prepared and reported by the selectors of jurors. It would seem that if a man over sixty years was returned as a juror, he could not be challenged, for s. 98 of the Act only allows a challenge in the event of the juror not being duly qualified. (b)

An alien, qualified and resident as the Statute prescribes, may be a juror in Nova Scotia. (c)

By s. 12 of our Statute no man, not being a natural born or naturalized subject of Her Majesty, shall be qualified to serve as a grand or petit juror.

Now, that juries *de meditate linguæ* have been abolished, an alien is never admitted as a juror in this Province.

Under the authority of the 29 & 30 Vic., c. 71, a proclamation issued on the 15th December, 1866, separating the County of Peel from the County of York, from and after the 1st of January, 1867. On the 28rd of November preceding, the usual precept had been sent to the Sheriff of the United Counties of York and Peel, for summoning jurors for the Winter Assizes for York, to be held on the 10th of January, 1867, and the Sheriff re-

(a) *Mulcahy v. Reg.* L. R. 3 E. & I. App. 325.

(b) See *Mulcahy v. Reg.*, *supra*.

(c) *Reg. v. Burdell*, 1 Oldright, 126.



turned his panel to that precept, containing fifty-four jurors from York and thirty from Peel. Only those from York, however, attended, and, the venue being unchanged, the proceeding on trial was under the 29 & 30 Vic., c. 51, s. 5<sup>2</sup>. The prisoner was tried by a jury *de meditate linguæ*, including six of these jurors, upon an indictment found and pleaded to at the previous Assizes in October. The prisoner applied for a new trial, or a *venire de novo* in effect, because the panel of jurors was drafted from the jury-list of the United Counties before the severance of the union, upon a precept previously issued, and addressed to the Sheriff of the United Counties; and because the panel of petit jurors returned to the Courts of *Oyer and Terminer* and General Gaol Delivery, held for the County of York alone, on the 10th of January, 1867, contained the names of jurors, some living in the County of York, and some in the County of Peel, or, in other words, the Court at which the prisoner was tried was a Court held in and for the County of York alone; the jurors could only be good and lawful men of that county; there was no precept for the summoning and returning a panel of jurors, addressed to the Sheriff of that county. No panel was drafted from the jury-list of that county, but all the jurors were drafted, summoned, and returned under the authority of a precept addressed to the Sheriff of the United Counties, and in obedience to the provisions of the Statute applicable to such Counties as united:—*Held*, per *Draper*, C. J., the objection, which was only to the due observance of certain rules, though involving a question of merits, in this sense, that every person has a right to be tried by a jury of good and lawful men, returned according to law to discharge that duty, if available at all, could only be taken by writ of error; per *Hagarty*, J., no objection would lie. (a)

(a) *Reg. v. Kennedy*, 28 U. C. Q. B. 326.

The Con. Stats. U. C., c. 31, s. 139, provides that no omission to observe the directions of the Act, or any of them, as respects the "selecting jury-lists from the jurors' rolls," or "the drafting panels from the jury-lists," shall be ground for impeaching the verdict.

In the above case, possibly, the array might have been quashed, because the Sheriff's return to the Court, which sat only for the County of York, contained the names of jurors resident out of that county. (a)

In Ontario, the usual practice, as to summoning jurors, is as follows:—A precept, signed by the Judges, who are always named in both commissions of *Oyer and Terminer* and Gaol Delivery, goes to the Sheriff, to return a general panel of jurors, and that precept is returned into Court on the first day of the Assizes with the panel, and from the names contained in that panel all the jurors, both in the civil and criminal side of the Court, are taken; and, as the Criminal Court always possesses the powers of Courts of *Oyer and Terminer* and General Gaol Delivery, the jury process awarded in that Court is entered on the roll "Therefore let a jury thereupon immediately come."

The Judge sitting at *Oyer and Terminer*, or Gaol Delivery, has power, after issue joined, to direct a jury to come for the trial of the prisoner, and the usual *venire facias*, "therefore let a jury thereupon immediately come," is sufficient, because under the Jury Act, Con. Stat. U. C., c. 31, there has been a previous precept issued for the return of jurors to that Court; and Justices of both these Courts have the same powers by the Act. (b)

Where a Court is held under a special commission, begun in one year and finished in the next, and no new precept has issued to the Sheriff, for the return of jurors, it is not necessary that the jury should be impanelled

(a) *Reg. v. Kennedy*, 26 U. C. Q. B. 331, per *Draper*, C. J.

(b) *Whelan v. Reg.* 28 U. C. Q. B. 84-5, per *Richards*, C. J.

from the jury-book for the latter year. (a) This might be requisite if the Act forbade a juror, duly summoned, to serve after the delivery of the new book to the Sheriff. (b)

It has been held that an alien, indicted for felony, has a right to be tried by a jury *de medietate linguæ*. (c) The 32 & 33 Vic., c. 29, s. 39, enacts that juries *de medietate linguæ* shall not, hereafter, be allowed in the case of aliens.

Where a prisoner has been arraigned on a charge of uttering forged paper, it is not competent for the Crown to order the trial by jury of a preliminary question, raised by the prisoner's counsel, to the effect that the prisoner had been extradited from the United States on a charge of forgery, and could not, therefore, be legally tried here for any other offence. This question must be determined by the Court. (d)

The maxim, that Judges shall decide questions of law, and juries questions of fact, is one of those principles which lie at the foundation of our law. (e) The principle applies in criminal as well as civil cases, though, in some cases, it rests with the jury to determine a mixed question of law and fact. (f)

The jury are bound to follow the direction of the Court in point of law; and where a jury attempted to persist in returning a verdict contrary to the direction of *Pollock*, C.B., he told them they were bound to return a verdict according to his direction in point of law, and explained that the facts only were within their province, and the law in his; and although he did not infringe on their province, he could not permit them to invade his.

(a) *Mulcahy v. Reg.* L. R. 3 E. & I. App. 306.

(b) *Ib.* 316, per *Willes*, J.

(c) *Reg. v. Vonhoff*, 10 L. C. J. 292; *Reg. v. Miller*, 8 L. C. J. 280.

(d) *Reg. v. Paxton*, 10 L. C. J. 212.

(e) *Winsor v. Reg.*, L. R. 1 Q. B. 303, per *Cockburn*, C. J.

(f) *Gray v. Reg.*, 1 E. & A. Reps. 504, per *Sir J. B. Robinson*, *Bart.*

He peremptorily directed them to return a verdict according to his direction in point of law. (a)

The jury have a right, after the summing up and conclusion of the case, and after retiring to their room to deliberate, to return to open Court, and re-examine any of the witnesses whose evidence was not well understood by them. (b)

The strictness of the rules regarding juries, and the conduct of trials, has been much relaxed in modern times. (c)

The misconduct, or irregular and improper conduct of juries, will only have the effect of vitiating their verdict, when it is such that the result of the trial has been influenced by it, or when there is any sufficient and reasonable ground to believe that such influence or effect has been produced by it. (d)

There is a substantial distinction in regard to misconduct of the jury, whether the irregularity took place before or after the jury are charged by the Judge. The indulgence in the way of separating, or otherwise, is much restricted after the charge. (e)

The fact that one of the jury, on a trial for felony, during a recess which took place in the progress of the trial, not being in charge of any officer, or other person, entered a public-house, and mentioned the subject of the trial to A., and had some slight conversation with other parties as to it, is, in the absence of evidence that the juror, or the verdict, was influenced by this, not sufficient to vitiate the verdict, or amount to a mis-trial. (f)

When a juror has separated from his brethren, and

(a) *Reg. v. Robinson*, 1 U. C. L. J. N. S. 53; 4 F. & F. 43.

(b) *Reg. v. Lamere*, 8 L. C. J. 281.

(c) *Reg. v. Kennedy*, 2 Thomson, 207, per *Halliburton*, C. J.

(d) *Ib.* 212, per *Bliss*, J.

(e) *Ib.* 221, per *Wilkins*, J.

(f) *Ib.* 203.

conversed with others on the subject of the cause in a way calculated to influence him in forming an opinion upon it, it amounts to a mis-trial, let the consequences be what they may: but if the juror is not influenced by anything which occurred in consequence of the separation, there is no mis-trial. (a)

In all criminal trials, less than felony, the jury may, in the discretion of the Court, and under its direction as to conditions, mode, and time, be allowed to separate during the progress of the trial. (b)

The Crown, as well as the prisoner, has a right to set aside a verdict vitiated by the juries' misconduct. (c)

There is no authority for ordering that a jury have refreshments during the period of their deliberation. (d)

As to discharging juries, there would seem to be no difference between misdemeanors and felonies. In both, the principles on which trial by jury is to be conducted are the same. (e)

If a juryman has merely fainted, because the Court-room is hot and close, it would be proper to wait a short time, and then proceed; but if he is taken so ill that there is no likelihood of his continuing to discharge his duty, without danger to his life, the jury must be discharged. (f)

Where the record of a conviction for felony shewed that, on the trial of an indictment, the jury being unable to agree, the Judge discharged them—that the prisoner was given in charge of another jury, at the next assizes, and a verdict of guilty returned, and judgment and sen-

(a) *Reg. v. Kennedy*, 2 Thomson, 206-7, per Halliburton, C. J.

(b) 32 & 33 Vic. c. 29, s. 57.

(c) *Reg. v. Kennedy*, 2 Thomson, 213, per Bliss, J.

(d) *Winsor v. Reg.* L. R. 1 Q. B. 308, per Cockburn, C. J.

(e) *Winsor v. Reg.*, L. R. 1 Q. B. 307, per Cockburn, C. J.

(f) *Ib.* 315, per Blackburn, J.

tence passed, on writ of error:—*Held*, that the Judge had a discretion to discharge the jury, which a court of error could not review—that the discharge of the first jury, without a verdict, was not equivalent to an acquittal—that a second jury process might issue, and that there was no error on the record. (a)

When the discharge of a jury is warranted by the rules of law, it does not operate as an acquittal, or bar another trial; but if the jury are wrongfully discharged, the prisoner cannot be put a second time on trial. (b)

The illness of a juror, or the illness of a prisoner, has been held sufficient ground for discharging the jury. (c)

A jury sworn and charged, even in case of felony, may be discharged, without verdict, in case of death or illness of one of the jury, or their being unable to agree, or at the desire of the accused, with the consent of the prosecution. (d)

The jury cannot be discharged at the instance of the prosecutor, in order to obtain evidence, of which, at the trial, there appears to be a failure. But it would seem that this is not a rule of positive law, and that there are exceptions to it; and where a witness is kept away by the prisoner, and by collusion between him and the prisoner, is tampered with, the rule should be relaxed, and the Judge permitted to discharge the jury.

Where a jury are discharged in consequence of their not agreeing, it is not necessary to wait; and, on the contrary, the Judge should not wait until the jury are exposed to the dangers which arise from exhaustion or prostrated strength of body and mind, or until there is a chance of conscience and conviction being sacrificed for

(a) *Winsor v. Reg.* L. R. 1 Q. B. 390, (Ex. Chr.)

(b) *Ib.*

(c) *Ib.* 305, per Cockburn, C. J.

(d) *Reg. v. Charlesworth*, 9 U. C. L. J. 53; 1 B. & S. 460.

personal convenience, and to be relieved from suffering. (a)

The defendant was put on trial for a misdemeanor. At the trial, a witness, called on behalf of the Crown, claimed his privilege not to give evidence on the ground that he would, thereby, criminate himself. The Judge, who presided at the trial, refused to allow him the privilege ; but, the witness still refusing to answer, he was committed to prison for contempt of Court, and a conviction of the defendant being, under these circumstances, impossible the jury, at the request of the counsel for the prosecution, and against the protest of the counsel for the defendant, were discharged without giving any verdict:—*Held*, that the defendant ought not to be allowed to put a plea upon the record stating the above facts, but that they ought to appear as an entry on the record. An entry was made upon the record accordingly ; when it was, further, held that, whether or no, the Judge had power to discharge the jury, what took place did not amount to a verdict of acquittal, nor was the prisoner entitled to plead *autrefois acquit* in respect thereof, and that the defendant was not entitled to judgment *quod eat sine die*, or to the interference of the Court to prevent the issuing of a fresh process. (b)

The old doctrine, that, if the jury could not agree, it was the duty of the Judge to carry them from town to town in a cart, has been exploded in modern times. It is certainly not now the practice. (c)

In criminal cases, not capital, where the verdict is so inconsistent and repugnant, or so ambiguous and uncertain, that no judgment can be safely pronounced upon it, a *venire de novo* may be awarded. (d)

(a) *Reg. v. Charlesworth*, 9 U. C. L. J. 48.

(b) *Reg. v. Charlesworth*, *supra*.

(c) *Winsor v. Reg.*, L. R. 1 Q. B. 305, per Cockburn, C. J. 320-1, per Mellor, J.

(d) *Reg. v. Healey*, 2 Thomson, 332-3, per Bliss, J.

Where, on an indictment for murder, the jury returned a verdict, in writing, in the following words : "Guilty of murder, with a recommendation to mercy, as there is no evidence to show malice aforethought and premeditation"—*Held*, that the verdict was too ambiguous and uncertain to allow the Court to pronounce any judgment upon it. (a)

A recommendation to mercy is no part of the verdict. (b)

If it were shewn that, upon the jury delivering their verdict in open Court, anything was openly said by them which could give the Court to understand that they were not openly assenting to that verdict, and, nevertheless, by some error or misapprehension, it was received as their unanimous verdict, the Court could, and ought to, interfere on such ground, and grant a new trial, when such a course was authorized by our criminal practice. (c)

A jury may correct their verdict, or any of them may withhold assent and express dissent therefrom, at any time before it is finally entered and confirmed. (d)

It is irregular for counsel to question the jury directly, and not through the Court, as to the grounds of their verdict. (e)

It would appear that the right of a jury to find a general verdict, in a criminal case, and to decline to find the facts specially, cannot be questioned, especially when the verdict is one of acquittal. (f)

It is doubtful whether a verdict can be received and recorded on a Sunday. (g)

(a) *Reg. v. Healey*, 2 Thomson, 331.

(b) See *Reg. v. Trebilcock*, 4 U. C. L. J. 168; Dears. & B. 453.

(c) *Reg. v. Fellowes*, 19 U. C. Q. B. 50, per *Robinson*, C. J.; and see *Reg. v. Ford*, 3 U. C. C. P. 217-8, per *Macaulay*, C. J.

(d) *Reg. v. Ford*, *supra*, 217, per *Macaulay*, C. J.

(e) *Ib.*

(f) *Reg. v. Spence*, 12 U. C. Q. B. 519.

(g) *Winsor v. Reg.* L. R. 1 Q. B. 308-317-322.



The Con. Stats. U. C., c. 113, 20 Vic., c. 61, has been repealed except sections 5, 16 and 17. By the 32 & 33 Vic., c. 29, s. 80, no appeal lies to the Court of Error and Appeal in any criminal case where the conviction has been affirmed, by either of the Superior Courts of common law, on any question of law reserved for the opinion of such Court.

Prior to the 20 Vic., c. 61, an appeal lay to the Superior Court, on any question reserved by the Sessions, or a Court of *Oyer and Terminer*, under the 14 & 15 Vic., c. 13. The latter Statute has not been repealed, and a question, reserved at the Sessions, or at a Court of *Oyer and Terminer*, may be adjudicated on by the Superior Court in *Banc*.

The following rules may still apply to the unrepealed Statute:—

1stly, In all cases of appeal from the judgment of the Court of Quarter Sessions, under the said Statute, notice of such appeal shall be given by the person convicted, or his attorney, to the county attorney for the county in which the conviction shall have taken place, within six days from the time of sentence being passed; or, in case there shall be no county attorney for such county, then to the Clerk of the Peace thereof; and an affidavit of service of such notice shall be filed in the Superior Court appealed to, with the papers directed by the said Statute to be transmitted from the Court of Quarter Sessions.

2ndly, A copy of the indictment, and of any subsequent pleadings, and of the verdict endorsed upon the indictment, shall be sent with the proceedings directed by the said Statute to be transmitted; and that, where the new trial has been moved for, upon the ground that the evidence did not warrant the conviction, a full statement of the evidence shall be sent with the case, signed and certified in the same manner.

3rdly, Every case sent from the Quarter Sessions shall state whether judgment on the conviction was passed or postponed, or the execution of the judgment respited; and whether the person convicted is in prison, or has been discharged on recognizance of bail to appear and receive judgment.

4thly, In every such case of appeal from a Court of Quarter Sessions, the original case, signed by the Recorder or Chairman of the Court, and four copies of such case, one for each Judge and one for the county attorney or other counsel for the Crown, shall be delivered to the Clerk of the Court appealed to, at least four days before the sitting of the said Court; provided that, where the new trial has been moved upon the evidence only, one copy of the report of the evidence in full need be filed, in addition to the statement of the evidence which has been certified; and that, when any case is intended to be argued by counsel, or by the parties, notice thereof be given to the Clerk of the Court appealed to, at least two days before the day appointed for argument, which shall be one of the paper days during the term.

In *Reg. v. Beckwith*, (a) effect was given to an objection that rules numbers 5, 6 and 7, under this Act, were not complied with.

The Court has no power to order a new trial, or to prevent a verdict of guilty from going into effect, on a criminal case reserved under the 14 & 15 Vic., c. 13, but only to decide upon any particular legal exceptions raised upon the pleadings, or the evidence, or upon the general question, which is strictly one of law, whether there was legal evidence to sustain the indictment, taking it in as strong a sense against the defendant as it will bear, and

(a) 8 U. C. C. P. 274.

supposing the jury to have given credit to it to its full extent. (a)

The question, can there be a new trial in case of felony is one which may be properly reserved. (b)

No case can be stated for the opinion of the Court for Crown cases reserved, except upon some question of law arising upon the trial. Where, therefore, the prisoner had pleaded guilty, and the question asked was, whether the prisoner's act, as described in the depositions, supported the indictment; the Court held that they had no jurisdiction to consider the case. (c)

When a case is reserved, under the Con. Stats. U. C., c. 112, the Court may arrest the judgment, with a view to a new indictment being preferred, or for other purposes. (d)

In *Reg. v. McEvoy*, (e) the Court, under the facts shewn, considered they might either enter an arrest of judgment, under the Statute, or direct judgment to be given as for a misdemeanor at common law; but the latter course was adopted because it was doubted whether the judgment could properly be arrested, where the indictment, though framed imperfectly, as for an offence against a Statute, does contain a sufficient charge of an offence at common law.

It would seem that the objections, on a motion to arrest the judgment, are confined to the points reserved under the Statute. (f)

Where, on an appeal from a conviction affirmed at the Sessions, it appeared that the point in question was purely

(a) *Reg. v. Baby*, 12 U. C. Q. B. 346.

(b) *Reg. v. D' Aoust*, 10 L. C. J. 221, per *Mondelet*, J.; 8 O. 16 L. C. R. 493, per *Meredith*, J.

(c) *Reg. v. Clark*, L. R. 1 C. C. R. 54; 36 L. J. (M. C.) 16.

(d) *Reg. v. Rose*, 1 U. C. L. J. 145; *Reg. v. Spence*, 11 U. C. Q. B. 31; *Reg. v. Orr*, 12 U. C. Q. B. 57. See ante p. 234; *Reg. v. Spence*, *infra*.

(e) 20 U. C. Q. B. 344.

(f) *Reg. v. Fennety*, 3 Allen, 132.

one of law, and there could be no object in sending the case down for a new trial, the judgment was arrested. (a)

The Court may, in certain cases, stay the entry of judgment until a new indictment is preferred, but, in such case, the indictment must be removed by *certiorari*. (b)

In criminal matters, foreign law should not be brought before the Court. (c) American authorities, though entitled to respect, will not be received as binding in our Courts. (d) Nor are English decisions absolutely binding in this country. (e)

If, after a verdict of guilty of felony, and when the Judge is about to pass sentence, objections are made by the prisoner's counsel in arrest of judgment, but overruled by the Judge trying the cause, the Court in *Banc* has authority to enquire into the validity of these objections, though the record does not state that the prisoner's counsel moved in arrest of judgment. The presence of the prisoner at the argument may be waived by consent of parties. (f)

The Court of Queen's Bench, in appeal, will adjudicate on a reserved case of misdemeanor in the absence of the defendant, who has fled beyond the jurisdiction of the Court. (g)

Where a man charged with felony is being tried, whatever may have been his position in life, he must take his place in the dock; but the misdemeanant, if on bail, is not obliged to do so. (h)

In criminal cases, it is always entirely in the discretion

(a) *Reg. v. Rubidge*, 25 U. C. Q. B. 299.

(b) *Reg. v. Spence*, 12 U. C. Q. B. 519.

(c) *Notman v. Reg.* 13 L. C. J. 259, per *Duval*, C. J.

(d) *Roberts v. Patillo*, 1 James, 367; *Reg. v. Creamer*, 10 L. C. R. 404.

(e) *Reg. v. Roy*, 11 L. C. J. 92.

(f) *Reg. v. Kennedy*, 2 Thomson, 204.

(g) *Reg. v. Fraser*, 14 L. C. J. 245.

(h) *Ex parte Blossom*, 10 L. C. J. 69, per *Meredith*, J.

of the Court to allow a view or not. It is, therefore, no irregularity to allow the jury to have a view of premises where an alleged offence has been committed, after the Judge has summed up the case. (a)

The Court ought to take such precautions as may be necessary to prevent the jury from improperly receiving evidence out of Court. Where, at proceedings on a view, evidence was received in the absence of the Judge, the prisoners, and their counsel, the Court for Crown cases reserved held that it is for the Court, before which the trial takes place, to ascertain whether such irregularity has taken place, and that they could not reverse the conviction, on the ground of a mere statement of what the Judge was informed. *Quære*, whether, if such irregularity had occurred, this Court would have jurisdiction to order a *venire do novo*, as for a mis-trial. *Quære*, also, whether, if the facts were thus tried, and found to be as alleged, they ought to be entered on the record, so as to give an opportunity of taking advantage of the defect by writ of error, or whether the question could be properly raised by a case stated for this Court. (b)

The Judge has a discretion to adjourn the trial when the counsel engaged in it becomes so ill as to be unable to proceed. One of the prisoner's counsel at the trial, whilst he was addressing the jury, at the close of the case, was suddenly seized with a fit, and incapacitated from proceeding further. No adjournment, however, was applied for; but the other, who was the senior counsel, continued the address to the jury, on the prisoner's behalf, without raising any objection that he was placed at a disadvantage by his colleague's disability. It did not, moreover, appear that the prisoner had been pre-

(a) *Reg. v. Martin*, L. R. 1 C. C. R. 378.

(b) *Ib.*

judiced by the absence of the counsel alluded to:—*Held*, no ground for a new trial; but, in such case, if a postponement had been asked, in consequence of the illness, it would have been in the discretion of the Judge to have granted it or not, and to have adjourned it for an hour or two, or to another day, or for several days, or until the following Court, as might have been thought reasonable. (a)

Objections, which it is intended to insist on afterwards, must be distinctly raised at the trial; and as the Judge presiding is authorized by the Con. Stats. U. C., c. 112, to reserve any question of law for the opinion of the Court, it is the more necessary that his attention should be drawn to every matter of law which is relied on for the prisoner, whether by way of suggestion on the defence, or of exception to the Judge's ruling, or direction at the trial. (b)

The objections should also be noted by the Judge, for the Court cannot notice grounds of objections taken in rules unless they appear in the Judge's notes; and it is the duty of counsel, on moving, to ascertain whether the objections they rely on were noted by the Judge who presided at the trial. If they do not appear to be noted, a reference should be made to the Judge to have the notes amended before they are made the grounds of a motion. (c)

There is nothing to prevent the Judge, on a criminal trial, having the notes of the evidence taken in writing by another person. (d)

The 32 & 33 Vic., c. 29, s. 32, provides that every objection to any indictment, for any defect, apparent on

(a) *Reg. v. Fick*, 16 U. C. C. P. 379.

(b) *Reg. v. Craig*, 7 U. C. C. P. 241, per *Draper*, C. J.

(c) *Reg. v. Des Jardins C. Co.*, 27 U. C. Q. B. 380, per *Morrison*, J. See also *Cousins v. Merrill*, 16 U. C. C. P. 120.

(d) *Duval dit Barbinas v. Reg.*, 14 L. C. R. 75, per *Meredith*, J.

the face thereof, must be taken by demurrer, or motion to quash the indictment, before the defendant has pleaded, and not afterwards. The object of this Statute was to prevent waste of time and labour in criminal trials, and to compel a legal defence to be resorted to at the earliest possible stage. The Court, therefore, will not arrest judgment after verdict, or reverse judgment in error, for any defect apparent on the face of the indictment, which could have been taken advantage of under this clause. (a)

The defendant is not in all cases, of acquittal, entitled to a copy of the indictment laid against him; and, where the charge was for obtaining goods by false pretences, copies of the indictment and papers, were refused. (b)

A copy of an indictment for high treason may be obtained by consent of the Attorney-General. (c)

The 32 & 33 Vic., c. 29, s. 26, provides that on an indictment for any offence laying a previous conviction, the offender shall in the first place, be arraigned upon so much only of the indictment as charges, the subsequent offence, and if he pleads not guilty, the jury shall be charged, in the first instance, to enquire concerning such subsequent offence only.

If, when, found guilty of the subsequent offence, the prisoner denies that he was previously convicted or stands mute of malice, or will not answer whether he is guilty or not guilty, the jury should then be charged to inquire concerning such previous conviction. (d)

Where an indictment contains, one count for larceny, and allegations in the nature of counts for previous convictions for misdemeanors, and the prisoner, being arraigned on the whole indictment, pleads not guilty, but

(a) *Reg. v. Mason*, 32 U. C. Q. B. 246.

(b) *Reg. v. Senecal*, 8 L. C. J. 286.

(c) *Rex v. M'Donel*, Taylor, 299.

(d) See *Reg. v. Harley*, 8 L. C. J. 280.

is not tried till a subsequent Assize, when he is given in charge on the count for larceny only, this does not amount to error, for he was properly given in charge to the jury, and, having been arraigned and his plea entered at a previous Assize, could not be prejudiced by any mistake in his arraignment. (a)

Under the English Acts, 5, Geo. 4, c. 84, s. 24, and 8 & 9 Vic., c. 113, s. 1, which are, in substance, the same as our 32 & 33 Vic., c. 29, s. 26, omitting the proof of the identity contained in the latter Act, it was held that the certificate of a previous conviction, required by these Acts, is sufficient, if it purports to be signed by an officer having the custody of the records, although that officer is therein described as the Deputy Clerk of the Peace of a Borough. (b)

The 32 & 33 Vic., c. 29, s. 45, provides that all persons tried for any indictable offence shall be admitted, after the close of the case for the prosecution, to make full answer and defence thereto, by counsel learned in the law.

Two counsel only can be heard on behalf of prisoners indicted for criminal offences, and persons tried for felonies may make their full defence by two counsel, and no more, before a jury wholly composed of persons skilled in the language of the defence. (c)

After two counsel had addressed the jury, on behalf of the prisoner, a third rose to do so, but was stopped by the Court. (d)

At the close of the case for the prosecution of three prisoners, defended by separate counsel, one was acquitted, and was called as a witness on behalf of *one* of the two remaining. This witness criminated the other

(a) *Reg. v. Mason*, 32 U. C. Q. B. 246.

(b) *Reg. v. Parsons*, L. R. 1 C. C. R. 24; 35 L. J. (M. C.) 167.

(c) *Reg. v. D' Aoust*, 9 L. C. J. 85.

(d) *Ib.*



prisoner:—*Held*, that the counsel of the prisoner criminated had a right to cross-examine and address the jury on the evidence so given. That, as this right had been refused, the conviction of the prisoner must be quashed, although the Court had offered to put the questions suggested by his counsel. (a)

It has been held that, in cases of public prosecutions for felony, instituted by the Crown, the law officers of the Crown, and those who represent them, were, in strictness, entitled to the reply, though no evidence was produced on the part of the prisoner. (b) But in Ontario, a counsel for the Crown, not being himself the Attorney or Solicitor General, had no right to reply in an ordinary prosecution for crime, where no witnesses were called for the defence. (c) Now, however, the right of reply shall always be allowed to the Attorney or Solicitor General, or to any Queen's Counsel, acting on behalf of the Crown. (d)

A Clerk of the Crown in Quebec, being a Queen's Counsel, has a right to be heard in a criminal case, on behalf of the Crown, notwithstanding Con. Stats. L. C., c. 77, s. 75; and the duties and powers of Clerks of the Crown not being defined in their commissions, nor by Statute, the Court will look to the English law, and the powers and duties of the Master of the Crown Office there, as a guide in deciding on the duties and powers of Clerks of the Crown in Quebec. (e)

Crown prosecutions differ from ordinary civil suits; for, if the Queen be prosecutor, there can be no *non pros*, or non-suit or demurrer to evidence. The prosecutor

(a) *Reg. v. Luck*, 1 U. C. L. J. 78; 3 F. & F. 483. See also *Reg. v. Coyle*, 2 U. C. L. J. 19.

(b) *Reg. v. Quatre Pattes*, 1 L. C. R. 317.

(c) *Reg. v. McLellan*, 9 U. C. L. J. 75.

(d) 32 & 33 Vic. c. 29, s. 45, ss. 2.

(e) *Reg. v. Carter*, 15 L. C. R. 291.

may be a witness, but not the defendant; and if the latter obtains judgment, he is not entitled to costs. (a)

The object of a challenge is to have an indifferent trial. (b)

The right of peremptory challenge, at common law, was a principal incident of the trial of felony. This right cannot be taken away by implication from the terms of a Statute, unless such implication is absolutely necessary for the interpretation of the Statute. (c)

In felonies, as well as misdemeanors, the Crown had the right of challenging any number of jurors peremptorily, without assigning any cause, until the panel was exhausted. (d)

The 32 & 33 Vic., c. 29, s. 38, enacts that, in all criminal trials, whether for treason, felony or misdemeanor, four jurors may be peremptorily challenged, on the part of the Crown.

The right of the Crown to cause any juror to stand aside until the panel has been gone through, or to challenge any number of jurors for cause, is not affected by this Statute.

Even before the Statute, on a trial for misdemeanor, the Crown might, without shewing cause, direct jurors, on their names being called by the Clerk of the Court, to "stand aside" until the panel was gone through. (e)

This was the well-understood practice on indictments for felony, as well as misdemeanor, and it is said that, before the Statute 33 Edw. 1, s. 1, st. 4, (f) the King might challenge peremptorily, without shewing cause, but that Act was construed to restrain the privilege, and to require

(a) *Reg. v. Pattee*, 5 U. C. P. R. 295; 7 C. L. J. N. S. 124.

(b) *Levinger v. Reg.* L. R. 3 P. C. App. 287, per *Sir J. Napier*.

(c) *Ib.* 289, per *Sir J. Napier*.

(d) *Reg. v. Fellowes*, 19 U. C. Q. B. 48.

(e) *Reg. v. Fraser*, 14 L. C. J. 245; *Reg. v. Benjamin*, 4 U. C. C. P. 179.

(f) See Con. Stats. U. C. c. 31, s. 101.

the Crown to shew cause if the panel was otherwise exhausted. (a) The restriction in practice thus imposed on the Crown is, that it shall not exercise its prerogative so as to make it necessary to put off the trial for want of a jury, such as the party arraigned is entitled to have on his trial. (b)

On a trial for felony, the Crown may, without shewing cause, direct a juror, on his name being called by the Clerk of the Court, to "stand aside," and, on the panel being read over a second time, may, without shewing cause for challenge, direct the same juror to stand aside a second time, and so on until the panel is exhausted, *i.e.* till it appears that a jury cannot be got without such juror. (c)

Calling the list over once is not exhausting the panel. (d)

The direction to stand aside is not, in fact, a challenge. (e)

But it is, in effect, equivalent to a peremptory challenge if, without having to resort to such of the jurors as have been "set by" for the time, on the part of the Crown, there can be procured from those returned on the panel enough of jurors, not objected to, to make a jury. (f)

It seems there is no authority for any challenge in misdemeanor, except for cause. (g) But the practice of ordering jurors to "stand by" enables the prosecutor to exercise, practically, the right of peremptory challenge. Any number of jurors may be challenged for cause. (h)

(a) *Reg. v. Benjamin*, 4 U. C. C. P. 185, per *Macaulay*, C. J.

(b) *Levinger v. Reg.*, L. R. 3 P. C. App. 288, per *Sir J. Napier*.

(c) *Reg. v. Lacombe*, 13 L. C. J. 259.

(d) *Ib.* 261, per *Monk*, J.; and see *Munsell v. Reg.*, 8 E. & B. 54; *Deara & B.* 375. See 32 & 33 Vic. c. 29, s. 41, as to supplying defect of jurors, if the panel is exhausted.

(e) *Reg. v. Lacombe*, *supra*, 261, per *Bulgley*, J.

(f) *Levinger v. Reg.* *supra*, 288, per *Sir J. Napier*.

(g) *Reg. v. Fraser*, 14 L. C. J. 245.

(h) *Whelan v. Reg.* 28 U. C. Q. B. 38, per *A. Wilson*, J.

Where, on a trial for felony, the jury-panel contained the names of J. T. and W. T., and, when the name of J. T. was called, a person, supposed to be J. T., went into the box, and was sworn without objection, and, the prisoner having been convicted, it was discovered the next day that W. T. had, by mistake, answered to the name of J. T., and was really the person who had served on the jury, it was held, by a majority of the Judges, that this was only ground of challenge. (*a*)

After the prisoner was arraigned, on his trial for murder, and had pleaded not guilty, and received the usual notice of his right to challenge, two jurors were called who were not challenged by him, and were thereupon sworn. The name of John Hill was then called, and a person answering to that name came forward, and was sworn without challenge or objection. Some others were afterwards called, and, on being challenged peremptorily by the prisoner, they withdrew ; and, after another was called and sworn without challenge, the prisoner's counsel objected to John Hill, as he was a witness in the case for the prosecution. Upon enquiry it was found that there was a person named John Hill returned on the panel, but that he was a different person from the John Hill sworn on the jury, and that the latter was, not only a witness, but also a resident of another county, and, therefore, not qualified to act as a jurymen. Upon consent of both the counsel for the Crown and the prisoner, he was allowed to retire, and other jurymen were called and sworn until the panel was full, the prisoner exercising the right of challenge until the jury was chosen. The juror was withdrawn before the prisoner was given in charge. The prisoner was tried and convicted, and, upon motion for a new trial, the Court held, first, that the John

(*a*) *Reg. v. Mellor*, 4 U. C. L. J. 192; *Dears. & B.* 468.

Hill, improperly sworn, was legally discharged from the jury ; second, that his discharge did not operate upon the jurors previously sworn, so as to render it necessary to re-swear them, and thus re-open the prisoner's right of challenge to them ; and, third, that, though thirteen persons were sworn to try the prisoner, the twelve by whom he was tried constituted the jury for his trial ; in other words, that he was properly tried by the twelve who constituted the jury. (a)

If a jury has been elected, tried and sworn, and charged with a prisoner, and are afterwards discharged without giving a verdict, either because they could not agree, or because they were discharged on motion of the prisoner's counsel, and at his request, and with the assent of the Crown counsel, a new jury would have been called and sworn in the ordinary way, and the prisoner would have the usual right of challenge to them. But if, before the whole jury has been completed, and the prisoner given in charge, as in the above case, an unqualified or disqualified juror is called and sworn, without challenge or objection, the withdrawal of the juror, at the request of the prisoner, and by the consent of the Crown, does not render it necessary to discharge the whole jury. Those already chosen and sworn may be retained, and the full complement of jurors may be made up from the others in Court, for it is not necessary to re-open the prisoner's right of challenge to the jurors already chosen, if the prisoner has not been given in charge. (b)

The prisoner desired to challenge S., one of the jurors called, for favour, alleging sufficient cause. The Judge ruled that he must first exhaust his peremptory challenges, and this point was raised by plea and demurrer,

(a) *Reg. v. Coulter*, 13 U. C. C. P. 299.

(b) *Ib.*

and formally decided. The prisoner then challenged S. peremptorily, and the entry on the record then was that, in deference to the judgment, the challenge was taken, and treated by the prisoner and by the Attorney-General as a peremptory challenge for, and on behalf of, the prisoner. Afterwards, having exhausted his twenty challenges, including S., he claimed to challenge peremptorily one H., contending that, by the erroneous ruling, he had been compelled to challenge S. peremptorily, and should not be obliged to count him as one of the twenty. This was also entered of record and decided against him: —*Held*, on error brought, that the prisoner was entitled to challenge for cause before exhausting his peremptory challenges; that error would lie for the refusal of this right, and that, had S. been sworn, there must have been a *venire de novo*, but that the prisoner, by peremptorily challenging the juror, S., waived or abandoned his right in respect of the erroneous decision of the Judge, and had not any *locus standi* to assign error for that decision, or for the rejection of the peremptory challenge to the juror H. (a)

If, after the improper disallowance of a challenge for cause, the prisoner withdraw his plea of not guilty, and plead guilty, that would cure the objection, because the whole record must be looked at, and not a merely isolated part of it; for one part of it may be controlled by another; and that which may be a cause of exception in one place, may be no exception when read in connection with the rest of the record. (b)

A prisoner, arraigned for uttering forged paper, has a right to challenge peremptorily, on the trial of a preliminary question, to the effect that the prisoner had been

(a) *Whelan v. Reg.*, 28 U. C. Q. B. 2; affirmed on appeal, *ib.* 108.

(b) *Whelan v. Reg.*, 28 U. C. Q. B. 164, per A. Wilson, J.

extradited from the United States, on a charge of forgery. (a)

It is a good cause of challenge to a juror, if he has said he would hang the prisoner, if on his jury. (b)

A Statute directed a jurors' book to be made up in each year, for use in the year following, and declared that such book should be in use from the first of January, for and during one year. In November, 1865, at a sitting of a special commission, a panel was returned from the then existing jury book. The jurors were not then called, but the sitting was duly adjourned to the 19th of January, 1866, at which time the trial took place, when the jurors named in the return of November, 1865, were called. One of the jurors, who had been duly returned in November, 1865, not being in the list for 1866:—*Held*, that this was not a ground of challenge to him. Nor did these facts shew any ground for challenge to the array. (c)

If one party apprehend the array will be challenged, on account of relationship between himself and the Sheriff, he may have the process directed to the Coroner, with the consent of the other party; and if the other do not consent, but insists there is no cause for the change of process, he cannot afterwards take advantage of the objection which he has himself alleged to be futile. (d)

At any time, before a juror is sworn, he may be examined as to his qualification, whether before or after the peremptory challenges are exhausted, in order to ascertain whether he is a person qualified to be a juror. (e)

If thirteen jurors are sworn to try the prisoner, the

(a) *Reg. v. Paxton*, 10 L. C. J. 212.  
(b) *Whelan v. Reg.* 28 U. C. Q. B. 29.  
(c) *Mulcahy v. Reg.*, L. R. 3 E. & I. App. 306.  
(d) *Whelan v. Reg.* 28 U. C. Q. B. 54.  
(e) *Ib.* 89.

swearing of the thirteenth would be void. and the other twelve would constitute the jury. (a)

Though a challenge has been improperly disallowed, yet, if no improper person get on the jury, their verdict, when none of them are disqualified, supports the judgment on the indictment. (b)

If, after a prisoner's challenge to a juror is disallowed; the Crown then challenged him, and the prisoner objected to it, unless the Crown shewed cause, in the first instance, or the prisoner contended the cause shewn by the Crown was insufficient, this would be a consenting to the juror as a proper juryman to be admitted to try the cause, or a waiver of all objection to him, and the prisoner could not, after that, revive his own original exception. (c)

So, after the improper disallowance of a challenge to one juror, the prisoner would be bound to renew his exceptions specifically to any jurors called afterwards, in order to establish a ground of error, or cause of complaint as to them. (d)

It is settled law that, unless a juryman is challenged before he is sworn, he cannot be challenged afterwards, except by consent. (e)

A prisoner cannot challenge at all until a full jury appears, and he must challenge to the array before he challenges to the polls. He must abide by his peremptory challenge when he makes it, and cannot withdraw it, and challenge another juror instead. The prisoner must also shew all his causes of objection before the Crown is called upon to shew cause. The party begin-

(a) *Reg. v. Coulter*, 13 U. C. C. P. 303, per *Draper*, C. J.

(b) *Whelan v. Reg.*, 28 U. C. Q. B. 137, per *Draper*, C. J.

(c) *Ib.* 53-4.

(d) *Ib.* 61, per *A. Wilson*, J.

(e) *Reg. v. Coulter*, 13 U. C. C. P. 301, per *Draper*, C. J.; *Reg. v. Mellor*, 4 Jur. N. S. 214.



ning to challenge must finish all his challenges before the other begins, and all challenges of the same kind and degree must be suggested against the juror at the same time. (a)

When there are two prisoners for trial, it would not be ground of error if the Judge directed one of them to challenge first, and to make his peremptory challenges before his challenges for cause, and then allow the other his challenges in like order. In such latter case, on a juror being called against whom there was a cause of challenge to the favour, he would not be challenged peremptorily, but would go into the jury box, to abide the result of all the challenges; and, when the peremptory challenges were through, those for cause would be proceeded with, and the juror would then be reached. (b)

When a prisoner, on his trial, assumes to challenge a juror for cause, it is competent for the Crown either to demur or to counterplead—that is, set up some new matter consistent with the matter of challenge, to vacate and annul it, as a ground of challenge, or to deny the truth, in point of fact, of what is alleged for matter of challenge. (c) The latter mode is the only one calling for the intervention of triors. (d)

A writ of error lies for every substantial defect appearing on the face of the record, for which the indictment might have been quashed, or which would have been fatal on demurrer, or in arrest of judgment. A writ of error is, therefore, the proper remedy for certain substantial defects appearing *on the face* of the record. (e)

A court of error is confined to errors appearing on the face of the record, and cannot exercise an appellate juris-

(a) *Whelan v. Reg.*, 28 U. C. Q. B. 49.

(b) *Ib.* 47-50.

(c) *Whelan v. Reg.*, 28 U. C. Q. B. 168-9, per *Gwynne*, J.

(d) *Ib.*

(e) *Duval dit Barbinais v. Reg.*, 14 L. C. R. 71.

diction, and enquire into the facts of the case, or, for any purpose, consider a matter not appearing on the record. (a)

Unless there be manifest error on the face of the record, it is the duty of the Court to affirm the judgment. (b)

The matter is to be decided as a strictly legal proposition, and, no consideration of the effect which the decision may have upon the parties, will be permitted to be taken into consideration, to mould the judgment of the Court by the exercise of discretion. (c)

A writ of error will lie where a *venire facias* for the summoning of jurors is addressed to improper parties. (d)

No writ of error will be allowed in any criminal case, unless founded on some question of law which could not have been reserved, or which the Judge presiding at the trial refused to reserve for the consideration of the Court having jurisdiction in such cases. (e)

Whether the Police Court is a Court of Justice, within 32 & 33 Vic., c. 21, s. 18, or not, is a question of law, which may be reserved by the Judge at the trial, under Con. Stat. U. C., c. 112, s. 1; and where it does not appear, upon the record in error, that the Judge refused to reserve such question, it cannot be considered upon a writ of error. (f)

There is no case in which the discretion of a Judge, exercised on a mixed question of law and fact, has been reviewed in error. (g)

It would seem that, when a Judge has a discretion to do or omit to do a particular thing, his judgment, in the

(a) *Duval dit Barbinas v. Reg.*, 14 L. C. R. 79, per *Duval*, C. J., 75, per *Meredith*, J.

(b) *Whelan v. Reg.*, 28 U. C. Q. B. 139, per *Draper*, C. J.

(c) *Ib.* 94.

(d) *Reg. v. Kennedy*, 26 U. C. Q. B. 332, per *Draper*, C. J.; *Crane v. Holland*, Cro. El. 138. See also *Willoughby v. Egerton*, Cro. El. 853.

(e) 32 & 33 Vic. c. 29, s. 80; *Reg. v. Mason*, 32 U. C. Q. B. 246.

(f) *Reg. v. Mason*, *supra*.

(g) *Winsor v. Reg.* L. R. 1 Q. B. 316.

exercise of that discretion, is not subject to revision in error. Rules of practice or procedure, on a criminal trial, rest pretty much in the discretion of the Judge, and cannot be made the foundation of a writ of error. (a)

The right of postponing the hearing and trial of the cause, urged by a prisoner as a ground of challenge, is discretionary with the Judge, and the question is only one of practice or procedure, and, therefore, not examinable in error. (b)

A challenge to the array overruled would be a ground of error, if the party did not afterwards challenge to the polls. (c)

The improper granting or refusing of a challenge is alike the foundation of a writ of error. (d)

The proceedings, on a rule for contempt, on the Crown side of the Court of Queen's Bench, do not constitute a criminal case within Con. Stat. L. C., c. 77, s. 56, and, as a writ of error does not lie, at common law, on an adjudication for contempt, for it is a judgment in immediate execution not examinable in any other tribunal; therefore, a writ of error does not lie with respect to judgment rendered on such a rule. (e)

For an improper award of a *venire de novo*, a writ of error lies for the subject. (f)

The proper proceeding to reverse a judgment of the Court of Quarter Sessions is by writ of error, not by *Habeas Corpus* and *certiorari*, as in the case of summary convictions. (g)

No writ of error lies upon a summary conviction, and

(a) *Winsor v. Reg.*, L. R. 1 Q. B. 316; *Whelan v. Reg.*, 28 U. C. Q. B. 1 et seq.

(b) *Ib.* 133.

(c) *Ib.* 61, per Wilson, J.

(d) *Ib.* 93.

(e) *Ramsay v. Reg.*, 11 L. C. J. 158.

(f) *Reg. v. Charlesworth*, 9 U. C. L. J. 51, per Crompton, J.

(g) *Reg. v. Powell*, 21 U. C. Q. B. 215.

it only lies on judgments in Courts of Record acting according to the course of the common law. (a)

A proceeding by writ of error is the more formal method of getting rid of an erroneous judgment, but, as the writ lies for error *in the judgment* where the judgment is void, perhaps it would not be the proper course. (b)

After judgment, the only remedy is by writ of error. (c) But error only lies on a final judgment. (d)

Error, as distinguished from appeal, will lie in a criminal case, from the Court of Error and Appeal to the Queen's Bench. (e)

The rule prevailing in civil cases that, when the error is in fact and not in law, the proceedings may be taken in the same Court, but, when the error is in the judgment itself, error must be in another and superior Court, extends also to criminal cases.

Therefore, the Court of Queen's Bench for Ontario has no authority, in criminal cases, either at common law or by Statute, to issue its own writ for the review of its own judgment upon error in law, returnable in a Superior Court. But the Court of Error and Appeal for Ontario has full power to issue a writ of error in criminal as well as civil cases, and, when the error is in the judgment in the Court of Queen's Bench, the writ of error should be issued out of the Court of Error and Appeal. The writ may be, as nearly as possible, in the form of a writ of appeal given by the orders of the Court, as published in 1850. (f)

A writ of error cannot be granted without the *flat* of the Attorney-General. (g)

(a) *Ramsay v. Reg.*, 11 L. C. J. 166.

(b) *Reg. v. Sullivan*, 15 U. C. Q. B. 198.

(c) See *Reg. v. Mason*, 29 U. C. Q. B. 435, per *Wilson, J.*; *Reg. v. Smith*, 10 U. C. Q. B. 99.

(d) *Ex parte Blossom*, 10 L. C. J. 42, per *Badgley, J.*

(e) *Whelan v. Reg.*, 28 U. C. Q. B. 108.

(f) *Ib.*

(g) *Notman v. Reg.*, 13 L. C. J. 255. See also *Whelan v. Reg.*, *supra*.

If, in an information of *quo warranto*, the Attorney-General have granted his *fiat* that a writ of error may issue, the Court will not interfere, the first being conclusive. (a)

The Attorney-General (or, in his absence, the Solicitor-General) alone can authorize the issue of a writ of error, and he cannot delegate that power to another. Where, therefore, a writ of error was issued and signed by Thomas K. Ramsay, acting for, and in the name of, Her Majesty's Attorney-General, and not by the Attorney-General himself, it was held illegal and void. (b)

On error, from the Court of Queen's Bench for Ontario to the Court of Error and Appeal, the party is at liberty, in the Court of Error and Appeal, to assign new errors, in addition to those laid in the Court of Queen's Bench. (c)

It has been already shewn that a Court of Error can only consider matters appearing on the face of the record. It follows, therefore, that matters which cannot be raised upon the record are not examinable in error. The pleadings, the proper continuance of the suit and process, the finding of the jury upon an issue, in fact, if any such had been joined, and the judgment are the only matters which can be raised upon the record, with a view to error. As a bill of exceptions does not lie in a criminal case, there is, therefore, no mode of causing the rulings of the Judge, upon questions of evidence, or his directions to the jury, to be made part of the record, and, consequently, such rulings or directions of the Judge cannot be reviewed in error. (d)

In this case, it was alleged that, in the course of the trial, a medical witness was ordered to make an analysis

(a) *Reg. v. Clarke*, 5 U. C. L. J. 263.

(b) *Dunlop v. Reg.* 11 L. C. J. 271.

(c) See *Whelan v. Reg.*, 28 U. C. Q. B. 110; *Reg. v. Mason*, 32 U. C. Q. B. 246.

(d) *Duval dit Barbinais v. Reg.*, 14 L. C. R. 72-4, per *Meredith*, J.

for the information of the jury ; that he had done so, and made a report, but that the report so made was not placed before the jury, as it ought to have been, and that, thereby, the prisoner was deprived of the advantage of important evidence in his favour:—*Held*, that, as the report could not have been submitted to the jury, except as part of the evidence, and, as neither the evidence, nor the ruling of the Judge in relation to it, nor his directions to the jury, can be brought under the consideration of this Court by a writ of error, that the plaintiff in error had not a right to have the record amended, so as to place before this Court the said report, and the entries in the register of the Court below respecting it. Nor could the plaintiff in error cause the record to be amended, so as to shew whether the Judge, who presided at the trial, wrote the notes of the evidence himself, or caused them to be written by another person ; nor so as to shew what precautions were taken for the safe-keeping of the jury, whilst deliberating upon their verdict out of Court, for the *pleadings* in a cause, and the *judgment* pronounced thereon, form the only grounds of the record returned in obedience to a writ of error. (a)

It need not appear, on the face of the record, that the jury, when they retired at the Judge's charge were in the custody of sworn constables. An objection on this ground cannot, therefore, be reviewed in error. Though the improper allowance or disallowance of a challenge is ground of error, yet, strictly speaking, there ought to be an answer in law, or in fact, to the challenge, and a judgment upon the issue raised.

When the proceedings on a challenge are regular, they may be made a part of the record, and may be examined in error. (b)

(a) *Duval dit Barbinas v. Reg.*, 14 L. C. R. 52.

(b) *Ib.* 74-5, per *Meredith*, J.

If it is desired to take the opinion of the Court on the rulings of the Judge, or his directions to the jury, the proper course is to apply to him to reserve a case, under the Statute, for the opinion of the Court. (a)

It is the common understanding in the profession that a prisoner can consent to nothing. (b) To purge error it would seem that a prisoner cannot consent that the evidence of witnesses given on a former trial should be read in place of a new examination of the witnesses, although the witness was present in Court, and was sworn and heard, his evidence read over, and the parties were told they were at liberty further to examine, and cross-examine him, (c) although this course has been adopted in several cases, (d) with the consent of the prisoner. (e)

A prisoner can consent to nothing manifestly irregular, as that his wife should be examined as a witness, or that the witnesses should be examined without being sworn, or that admissions made by his attorney to the opposite attorney out of Court should be received as evidence in the cause. (f)

A prisoner may consent to withdraw or release his challenge, altogether, or to accept a juror, on his challenge being overruled. He might consent to secondary evidence being given, and it would seem, although no notice to produce had been served. He might consent to withdraw a plea in abatement, and he may withdraw his plea of not guilty, and plead guilty. So he might consent that the jury should take with them plans or writings not under seal, which were given in evidence. (g)

- (a) *Duval dit Barbinais v. Reg.*, 14 L. C. R. 74, per Meredith, J.
- (b) *Reg. v. Bertrand*, L. R. 1 P. C. App. 534, per Sir John T. Coleridge.
- (c) *Ib.* 520.
- (d) *Rex v. Street*, 2 C. & P. 413; *Rex v. Foster*, 7 C. & P. 495.
- (e) *Whelan v. Reg.*, 28 U. C. Q. B. 52, per A. Wilson, J.
- (f) *Ib.* 52.
- (g) *Ib.* 53-4, per A. Wilson, J.

 A *concilium* has been granted for the argument of errors in the Court of Queen's Bench. (a)

It would seem that the Court may direct Crown cases to stand on the new trial paper for argument with ordinary suits between party and party. (b)

If a juror against whom there is a good cause of challenge is sworn, and sits on the jury, there would be a mis-trial, and the proceedings would amount to error, and on writ of error brought, the Court would direct a *venire de novo*, if the party was not allowed to challenge for cause, and was directed to challenge peremptorily. (c)

A mis-trial vitiates and annuls the verdict, *in toto*, and the only judgment is a *venire de novo*, because the prisoner was never, in contemplation of law, in any jeopardy on his first trial. (d)

The distinction between a *venire de novo*, and a new trial, is that the former must be granted, in respect of matters appearing upon the record, but a new trial may be granted upon things out of it. (e)

It seems that a *venire de novo* can be awarded in a case of felony on a defective verdict. (f)

Unless, there is such an irregularity as to annul all the proceedings on the record, subsequent to the award of the jury process, and render the first trial an absolute nullity, a *venire de novo* should not be granted. (g)

There is no authority that an abortive trial prevents a *venire de novo* in a case of misdemeanor (h); and if a trial proves abortive a *venire de novo* may be awarded in a case of felony as well as misdemeanor. (i)

(a) *Whelan v. Reg.* 28 U. C. Q. B. 15.

(b) *Reg. v. Sinnott*, 27 U. C. Q. B. 539.

(c) *Whelan v. Reg.*, 28 U. C. Q. B. 51-91.

(d) *Ib.* 137.

(e) *Reg. v. Kennedy*, 2 Thomson, 215, per Bliss, J.

(f) *Winsor v. Reg.*, L. R. 1 Q. B. 319, per Blackburn, J; *Campbell v. Reg.*, 11 Q. B. 799; *Gray v. Reg.* 11 Cl. & F. 427.

(g) *Reg. v. Kennedy*, *supra*, 223, per Wilkins, J.

(h) *Reg. v. Charlenworth*, 9 U. C. L. J. 51.

(i) *Winsor v. Reg.*, L. R. 1 Q. B. 319.



A verdict, on a charge of felony, has been held to be a nullity and a *venire de novo* awarded in cases of defect of jurisdiction, in respect of time, place, or person, or where the verdict is so insufficiently expressed, or so ambiguous that a judgment could not be founded thereon. (a)

A prisoner having been tried and convicted of a capital felony, by a Court of *Oyer and Terminer*, in New South Wales, and sentence of death passed, and the judgment entered upon record, an application was made to the Supreme Court, sitting in *Banc*, for a rule for a *venire de novo* on an affidavit which stated that one of the jury had informed the deponent that, pending the trial, and before the verdict, the jury having adjourned to an hotel had access to newspapers which contained a report of the trial as it proceeded, with comments thereon. The Supreme Court made the rule absolute, considering that there had been a mis-trial, and ordered an entry to be made on the record of the circumstances deposed to, that the judgment on the verdict should be vacated, and a fresh trial had; on appeal to Her Majesty in Council:--*Held* by the Judicial Committee that a *venire de novo* cannot be awarded after verdict upon a charge of felony, tried upon a good indictment and before a competent tribunal, where the prisoner has been given in charge to a jury in due form of law empanelled, chosen and sworn; secondly, that if a *venire de novo* could be awarded upon an application, by way of error on appeal, the proceeding in the Supreme Court, was defective in form, and not warranted by the suggestion entered on the record, and, therefore, thirdly, that the order for vacating the judgment, and for a *venire de novo* must be set aside. (b)

The application for a *venire de novo*, in this case, was

(a) *Reg. v. Murphy*, L. R. 2 P. C. App. 548, per Sir Wm. Erle.

(b) *Reg. v. Murphy*, *supra*, 535.

considered as an attempt to obtain a new trial by the exercise of discretion, and the principal ground of the decision was that a new trial could not be granted in a case of felony. (a)

A sentence of death need not be conformable to the English Act, 23 Geo. 2, c. 17, s. 1, and a sentence in these words "that you be taken to the place of execution at such time, as His Excellency the Lieutenant-Governor may direct," is sufficient. (b)

A prisoner, who has been convicted of felony at the Assizes, may be brought up into this Court to receive sentence. (c)

No warrant is required to execute a sentence of death, for, in contemplation of law, there is a record of the judgment which may be drawn up at any time. It is not necessary that a Judge of a criminal Court should sign any warrant or sentence directing any punishment. (d) In Nova Scotia, the warrant for execution issued from the Court, and the time and place of execution was endorsed on it by the *fiat* of the Governor. (e)

In general, there can be no costs allowed in Crown cases. (f)

But the rule that the King neither pays nor receives costs, is not universal, nor inflexible. (g)

On putting off the trial of an information for penalties at the instance of the defendant, the Court will make payment of costs a condition in the same way as in civil cases. (h) When a defendant, on an indictment for perjury, puts off the trial, he must pay costs on the principle

(a) See *Reg. v. Bertrand*, L. R. 1 P. C. App. 520.

(b) *Reg. v. Kennedy*, 2 Thomson, 218.

(c) *Rex v. Kenrey*, 5 U. C. Q. B. O. S. 317.

(d) *Ovens v. Taylor*, 19 U. C. C. P. 53-4, per *Hagarty, J.*

(e) *Reg. v. Kennedy*, 2 Thomson, 213.

(f) *Reg. v. Justices, York*, 1 Allen, 90.

(g) *Rex v. Ives*, Draper 456, per *Macaulay, C. J.*

(h) *Ib.* 453.

that an indulgence is granted to him, which ought not to occasion additional expense. When the King is a party costs may be receivable, when there has been default on one side or an indulgence on the other, although, upon a conviction or acquittal, none would be taxable. (a)

Where after a rule *nisi* for a *mandamus* had been served, the applicant gave notice that it would not be proceeded with, but did not offer to pay any costs, the Court, on application, discharged the rule with costs up to the time of the notice, and costs of said application. (b)

The Court will not entertain an application for costs of an appeal against the decision of a Justice, under the 20 & 21 Vic., c. 43, in the term after that in which judgment is pronounced. (c)

An attachment cannot be granted against a corporation for a non-payment of costs. (d)

Under 32 & 33 Vic., c. 31, s. 65, and 33 Vic. c. 27, the Court of Sessions has no power to award costs, on discharging an appeal for want of proper notice of appeal for the words "shall hear and determine the matter of appeal" mean deciding it upon the merits (e)

The 5 & 6 W. & M., c. 33, s. 3, enacts that, if the defendant prosecuting a writ of *certiorari* be convicted of the offence for which he was indicted, then the Court shall give reasonable costs to the prosecutor, if he be the party grieved or injured, or be a Justice of the Peace, mayor, bailiff, constable, head borough tithing man, churchwarden, or overseer of the poor, or any other civil officer who shall prosecute upon the account of any fact committed or done that concerned him or them, as officer or offi-

(a) *Rex v. Ives*, Draper 454, per Robinson, C. J.

(b) *Reg. v. Justices, Huron*, 31 U. C. Q. B. 335.

(c) *Budenberg and Roberts*, L. R. 2 C. P. 292.

(d) *Rector St. John v. Crawford*, 3 Allen, 266. See also *Rex v. M'Kencie*, Taylor, 70.

(e) *Re Madden*, 31 U. C. Q. B. 333.

cers, to prosecute or present. The defendants were indicted before the General Quarter Sessions of the Peace for a nuisance, in obstructing a highway, and they removed the indictment into the Court of Common Pleas, where they were afterwards, severally, convicted and judgment given against them. A motion was made for a rule absolute ordering the costs of prosecuting the indictment to be taxed by the master, and that the said costs should be allowed to the Municipality as the prosecutors of the indictment, and paid by the said defendant to the said Municipality. The Court refused the rule, and laid down that the regularly established practice was to issue a side-bar rule to tax the costs, and when the side-bar rule is obtained, the officers do not proceed to taxation until notice has been given to the bail.

The question, who, as prosecutors, were entitled to the costs might be discussed on a motion to set aside the side bar rule, when both parties are before the Court, or it might come up on opposing a motion for an attachment, for non-payment of the costs taxed after demand made, as required by the Statute. (a) The defendant, after a demand of costs, under a rule of Court, by the plaintiff's attorney, paid the amount to the plaintiff. The attorney, afterwards, obtained a rule for an attachment, for non-payment of the costs, but, before the attachment issued, was informed of the payment to the plaintiff:—*Held*, that he was not justified in, afterwards, issuing an attachment for the costs of an affidavit of the demand of payment, and the costs subsequently incurred. (b)

The Statutes authorizing the granting of new trials, in criminal cases, have been repealed, and now, throughout

(a) *Reg. v. Gordon*, 8 U. C. C. P. 58.

(b) *Reg. v. Harper*, 2 Allen, 433.

the Dominion, there is one uniform law, similar to that of England, on this point. (a)

By the law of England, no new trial can be granted in case of felony. (b) Such was also the law of Quebec, even prior to the recent Statute, (c) and in Nova Scotia. (d)

When the indictment has been removed into the Queen's Bench, by *certiorari*, and is tried at the Assizes, it seems the Court has power to grant a new trial, where an individual or a corporation has been acquitted on a charge of misdemeanor. (e)

The Crown, or the prosecutor, had no right to a new trial, under the Statutes, in case of an acquittal. (f)

Superior jurisdictions cannot grant a new trial upon the merits, but only for an irregularity. (g)

It would seem that the Court of Queen's Bench will not grant a new trial, after conviction of misdemeanor at the Assizes, and before judgment, upon the Judge's report of the evidence. (h)

The Court has power, at common law, to grant a new trial in any case of misdemeanor, tried at the Assizes, on a record from the Queen's Bench. (i)

But until the passing of the 20 Vic., c. 61, a new trial could not be granted in any criminal case in Ontario, tried at a Court of *Oyer and Terminer* and Gaol Delivery, or Quarter Sessions. (j)

Where an indictment is preferred at the Sessions, or

(a) See 32 & 33 Vic. c. 29, s. 80.

(b) *Reg. v. Bertrand*, L. R. 1 P. C. App. 520; *Reg. v. Murphy*, L. R. 2 P. C. App. 535.

(c) *Reg. v. D' Aoust*, 10 L. C. J. 221; S. C., 9 L. C. J. 85, overruled; *Reg. v. Bruce*, 10 L. C. R. 117; *Gibb v. Tilstone*, 9 L. C. R. 244.

(d) *Reg. v. Kennedy*, 2 Thomson, 203.

(e) *Reg. v. G. T. R.* 15 U. C. Q. B. 121; but see *Reg. v. Johnson*, 6 U. C. L. J. 287; 6 Jur. N. S. 553; 8 W. R. 238.

(f) *Reg. v. Seddons*, 16 U. C. C. P. 395, per A. Wilson, J.

(g) *Yearke v. Bingleman*, 28 U. C. Q. B. 557, per Richards, C. J.; *Rex v. Oxford*, 13 Ea. 416 n.

(h) *Yearke v. Bingleman*, *supra*, 557, per Richards, C. J.

(i) *Reg. v. Fellowes*, 19 U. C. Q. B. 51, per Robinson, C. J.

(j) *Reg. v. Fitzgerald*, 20 U. C. Q. B. 546.

at a Court of *Oyer and Terminer*, it seems the indictment may be removed into the Queen's Bench, and sent down to trial on a *nisi prius* record, with a view to applying for a new trial, in the event of an adverse verdict. (a) It seems, also, the indictment, if tried at the Sessions, or at a Court of *Oyer and Terminer*, might be removed into the Queen's Bench after verdict, but before judgment; and that the proper course, at the trial, would be to apply to the Judge to stay the giving of judgment until the indictment could be removed. (b)

When the record is on the civil side of the Court, all the incidents of a civil cause attach to it. (c) Thus, when the indictment has been preferred in the Queen's Bench, or has been removed into that Court by *certiorari*, and is sent down to be tried at *nisi prius*, as all the incidents of a trial at *nisi prius* attach to it, a new trial may be granted after conviction. (d)

It would seem that the foregoing remarks as to new trial, when the record is tried on the *nisi prius* side of the Court, can only hold, if at all, when the charge is of misdemeanor. When the charge is of felony, no new trial can be granted, though the indictment has been removed by *certiorari*, and sent down to trial at the assizes, on a *nisi prius* record. (e)

Many cases were decided, under the 20 Vic., c. 61, while it was in force. It only authorized a new trial on any point of law, or question of fact, raised at the trial. (f)

It was, at least, extremely doubtful whether affidavits

(a) *Reg. v. Lafferty*, 9 U. C. Q. B. 306.

(b) *Reg. v. Smith*, 10 U. C. Q. B. 99. See also *Reg. v. Gzowski*, 14 U. C. Q. B. 591.

(c) *Reg. v. D' Aoust*, 10 L. C. J. 223.

(d) S. C. 16 L. C. R. 494-5, per *Meredith*, J. See also Arch. Cr. Pldg. 178.

(e) *Reg. v. Bertrand*, L. R. 1 P. C. App. 520, overruling, *Reg. v. Scaife*, 17 Q. B. 238.

(f) See *Gray v. Reg.*, 1 E. & A. Rep. 501; *Reg. v. Crozier*, 17 U. C. Q. B. 275; *Reg. v. Oxentine*, 17 U. C. Q. B. 295; *Reg. v. Hambly*, 16 U. C. Q. B. 617; *Reg. v. Chubbs*, 14 U. C. C. P. 32; *Reg. v. Finkle*, 15 U. C. C. P. 453.

could be received on an application for a new trial, under the 20 Vic., c. 61. (a)

Defendant was convicted, at a Recorder's Court, of obstructing a highway, on contradictory evidence, the result of the verdict being to shew that he and several others, whose houses and enclosures had been standing for sixty years, were encroaching upon the street. A new trial having been refused; on appeal, the indictment and evidence only was returned to this Court, with a copy of the rule *nisi*. The Court, under these circumstances, considering the importance of the case, and that the grounds of the judgment below, and the charge and direction of the Recorder to the jury, were not given to them, directed a new trial, contrary to the usual rule, which was affirmed, that such appeals will not be granted on questions of evidence. (b)

A Court of Quarter Sessions, in virtue of its own original jurisdiction at common law, has no power to grant a new trial, on an appeal from a Justice's conviction. (c)

Where, after conviction for a capital felony, the proceedings were discovered to have been illegal, there having been no associate Judge sitting in Court during the trial, on motion, on behalf of the Crown, (the prisoner not moving in any way) the indictment and conviction with the prisoner were brought up on *certiorari* and *Habeas Corpus*, and an order made, setting aside all proceedings, and remanding the prisoner to custody, with a view to a new trial. (d)

It was no ground for a new trial that several witnesses

(a) See *Reg. v. Chubbs*, 14 U. C. C. P. 36, per *A. Wilson, J.*; *Reg. v. Beckwith*, 8 U. C. C. P. 274; *Reg. v. Crozier*, 17 U. C. Q. B. 275; *Reg. v. Ozentine*, 17 U. C. Q. B. 295; *Reg. v. Fitzgerald*, 20 U. C. Q. B. 546; *Reg. v. Hamilton*, 16 U. C. C. P. 340; *Reg. v. McIlroy*, 15 U. C. C. P. 116.

(b) *Reg. v. M'Lean*, 22 U. C. Q. B. 443.

(c) *Yearke v. Bingleman*, 28 U. C. Q. B. 551.

(d) *Reg. v. Sullivan*, 15 U. C. Q. B. 198.

were examined for the Crown, whose names were not on the back of the indictment. (a)

In the case of felony or treason, if a conviction takes place against the weight of evidence, the Judge passes sentence, and respites execution till application can be made to the mercy of the Crown. (b)

It would seem that is the proper course to adopt now in Canada, in cases where, formerly, a new trial might be had by Statute. (c)

The Court of Queen's Bench, in Lower Canada, sitting in appeal and error, as a Court of Error, in a criminal case, under Con. Stats. L. C., c. 77, s. 56, cannot exercise an appellate jurisdiction, but is confined, as a Court of Error, to errors appearing on the face of the record. (d)

In Ontario, appeals to the Court of Error and Appeal were, in criminal cases, confined to such as arose under the Con. Stats. U. C., c. 113. respecting new trials. But such right of appeal is now abolished.

It is the inherent prerogative right, and, in all proper cases, the duty of the Queen in Council, to exercise an appellate jurisdiction in all cases, criminal as well as civil, arising in the colonies, from which an appeal lies, and where, either by the terms of a Charter or Statute, the power of the Crown has not been parted with. This right of appeal should be exercised with a view, not only to ensure, as far as may be, the due administration of justice in an individual case, but also to preserve, generally, the due course of procedure. The exercise of this branch of the prerogative, in criminal cases, is to be cautiously admitted, and is to be regulated by a consider-

(a) *Reg. v. M'Mahon*, 26 U. C. Q. B. 195.

(b) *Yearke and Bingleman*, 28 U. C. Q. B. 557, per *Richards*, C. J.

(c) See *Reg. v. Bertrand*, L. R. 1 P. C. App. 520-536; *Reg. v. Murphy*, L. R. 2 P. C. App. 552, per *Sir Wm. Erle*; *Reg. v. Kennedy*, 2 Thomson, 216, per *Bliss*, J.

(d) *Duval dit Barbinas v. Reg.*, 14 L. C. R. 52.



ation of circumstances and consequences, Leave to appeal will only be granted under special circumstances, such as when a case raises questions of great and general importance in the administration of justice, or where the due and orderly administration of the law has been interrupted, or diverted into a new course, which might create a precedent for the future ; and also when there is no other means of preventing these consequences, then it will be proper for the Judicial Committee to advise the allowance of such appeal. (a)

It is doubtful whether an appeal lies to the Queen in Council, against a judgment of the Court of Queen's Bench in Quebec, quashing a writ of error against an order of the Court of Queen's Bench, on the Crown side, fining and ordering an attachment against a counsel, for an alleged contempt of Court. It would seem, however, that, where a fine is imposed, the remedy is to petition the Crown for a reference to the Judicial Committee, under the 3 & 4 Wm. 4, c. 41, s. 4. (b)

Special leave to appeal to the Privy Council was granted to the Attorney-General of New South Wales, from an order of the Supreme Court in that colony, whereby a verdict of guilty of murder, obtained by the Crown, was set aside, and a *venire de novo* for a re-trial ordered to issue. The leave was granted on the same conditions as in *Reg. v. Bertrand*, and the proceedings in the colony were stayed, pending the appeal. (c)

Leave to appeal has been given from an order of the Supreme Court of Civil Justice of British Guiana, committing the publisher of a local journal to prison for six months, for an alleged contempt of Court, in publishing,

(a) *Reg. v. Bertrand*, L. R. 1 P. C. App. 520. See also *Falkland Islands Co. v. Reg.*, 10 U. C. L. J. 167 ; 1 Moore's P. C. Cases, N. S. 299.

(b) *Re Ramsay*, L. R. 3 P. C. App. 427.

(c) *Reg. v. Murphy*, L. R. 2 P. C. App. 535.

in such journal, comments on the administration of justice by that Court, with liberty, to the Judges of the Supreme Court, to object to the competency of such appeal at the hearing. (a)

Special leave to appeal will be granted where the question raised is one of public interest, involving the constitutional rights of a Colonial Legislative Assembly. (b)

Permission was given to appeal, in *formâ pauperis*, in a case in which the appellant was not heard in the Court below, and was denied leave to appeal to Her Majesty in Council, the decision being, in fact, *ex parte*. (c)

Leave to appeal from an order of the Supreme Court of Nova Scotia, suspending an attorney and barrister from practising in that Court, has been granted, though, under the circumstances, it was incumbent on the appellant to apply to Her Majesty, in the first instance, to admit the appeal. On a suggestion of the injury and delay which an application to Her Majesty would create, the appeal was allowed by the Privy Council. (d)

Special leave to appeal was granted, under the circumstances shewn in *Reg. v. Murphy*. (e)

Special leave to appeal from a conviction of a Colonial Court for a misdemeanor having been given, subject to the question of the jurisdiction of Her Majesty to admit such an appeal, and it appearing, at the opening of the appeal, that, since such qualified leave had been granted, the prisoner had obtained a free pardon, and been discharged from prison, the Judicial Committee declined to enter upon the merits of the case, or to pronounce an

(a) *Re M'Dermott*, L. R. 1 P. C. App. 260.

(b) *The Speaker of the Legislative Assembly of Victoria v. Glass*, L. R. 3 P. C. App. 560.

(c) *George v. Reg.*, L. R. 1 P. C. App. 389.

(d) *Re Wallace*, L. R. 1 P. C. App. 292-3.

(e) L. R. 2 P. C. App. 538.

opinion upon the legal objections to the conviction, the prisoner having obtained the substantial benefit of a free pardon. They, accordingly, dismissed the appeal. (a)

It seems the Privy Council would entertain an appeal from the Court of Error and Appeal for Ontario, without express leave of such Court. (b)

No appeal to England is expressly given by our Statutes, in criminal cases, but several appeals to the Privy Council have been made in the Dominion.

(a) *Levien v. Reg.*, L. R. 1 P. C. App. 538.

(b) *Whelan v. Reg.*, 28 U. C. Q. B. 186, per *Draper*, C. J.; *Naiker v. Yeltia*, L. R. 1 P. C. App. 1; *Ko Khine v. Snadden*, L. R. 2 P. C. App. 50.

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## ERRATA.

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Page 9—Reference (c) *for* 3 C. L. J. n. 122, *read* 3 C. L. J. N. S. 122.

Page 66—Reference (a) *for* ante p., *read* ante p. 55.

Page 66—Reference (b) *for* ante p., *read* ante p. 52.

Page 66—Reference (c) *for* 4-45, *read* 44-5.

Page 75—Reference (c) line 3, *for* 3 U. v. Q. B. *read* 3 U. C. Q. B.

Page 75—Reference (c) line 3, *for* Marsh 6 B. C. 551, *read* 6 B. & C. 551.

Page 96—Reference (k) *for* Reg. v. Mayor Tewkesbury, L. R. Q. B. 635, per Blackburn, J., *read* L. R. 3 Q. B.

Page 153—Reference (b) omitted 6 E. &.

Page 263—Line 13 from top, *the* omitted after *see*.

Page 263—Line 3 from bottom, *will* omitted before *not*.











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